



April 22, 2024

VIA ELECTRONIC SUBMISSION

Mr. David Dickinson
Office of Transportation and Air Quality
U.S. Environmental Protection Agency
Washington, DC

Re: California State Nonroad Engine Pollution Control Standards; In-Use Locomotive Regulation; Requests for Authorization; Opportunity for Public Hearing and Comment (Docket No. FRL-11737-01-OAR)

Dear Mr. Dickinson:

On February 27, 2024, the U.S. Environmental Protection Agency (EPA) published a notice that the state of California has requested the EPA to authorize its In-Use Locomotive Regulation.¹ This letter constitutes the Office of Advocacy's (Advocacy) public comments on the EPA's pending decision to authorize the regulation.

Advocacy is concerned that California's proposed rule will disproportionately harm small locomotives. Advocacy is also concerned the rule will impact small businesses nationwide who rely on the country's rail system. As such, Advocacy recommends the EPA require California to mitigate impacts on small businesses before authorizing the In-Use Locomotive Rule.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

¹ 89 Fed. Reg. 11484 (Feb. 27, 2024).

The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.⁴ Additionally, Section 609 of the RFA requires the Consumer Financial Protection Bureau, the Occupational Safety and Health Administration, and the Environmental Protection Agency to conduct special outreach efforts through a review panel.⁵ The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.⁶ If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.⁷ The agency must provide a statement of factual basis that adequately supports its certification.⁸

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁹ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.¹⁰

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."¹¹

B. The Proposed Rule

Section 209(e)(2)(a) of the Clean Air Act allows California to promulgate air quality regulations for certain nonroad vehicles and engines stricter than those of the federal government.¹² In order for these standards to become effective, the EPA must authorize them. Before authorizing any proposed standard from California, the EPA considers:

- Whether the proposed standard is arbitrary and capricious;
- Whether California needs the proposed standard to meet compelling and extraordinary conditions; and
- Whether the proposed standard and enforcement is consistent with Section 209 of the Clean Air Act.¹³

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

³ Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

⁴ 5 U.S.C. § 603.

⁵ *Id.* § 609.

⁶ *Id.*

⁷ *Id.* § 605(b).

⁸ *Id.*

⁹ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

¹⁰ *Id.*

¹¹ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

¹² 42 U.S.C. § 7543(e)(2)(A).

¹³ *Id.*

The In-Use Locomotive Regulation has four main elements:

1. A requirement for locomotives to use a portion of their own revenues to establish a trust account. The proceeds from that trust account must be spent on emissions reduction technologies;
2. In-use operational requirements for zero-emissions technology. Additionally, locomotives more than 23 years old will no longer be allowed to operate within California;
3. Locomotives will not be allowed to idle for more than 30 minutes. Exemptions are contained in the rule for certain circumstances; and
4. Reporting and recordkeeping requirements.¹⁴

Once the EPA authorizes a California standard, any other state may choose to adopt and enforce it over an existing federal standard.¹⁵ For this reason, a regulation approved in California can impact small entities nationwide.

II. Advocacy's Small Business Concerns

Advocacy is concerned California's proposed rule will disproportionately impact small businesses in the locomotive sector as well as small entities who depend on the locomotive sector.

A. California's Proposed Rule Disproportionally Impacts Short Line Railroads.

The In-Use Locomotive Rule will impact all locomotives, including short-line railroads. Railroads are divided into three classes by the Surface Transportation Board, with Class I railroads being the largest and Class III railroads being the smallest.¹⁶ Short line railroads are mostly Class III railroads and small businesses employing fewer than 30 people.¹⁷ While Class I railroads may be able to absorb the costs associated with the In-Use Locomotive Rule, Class II and III railroads will not be able to do so.¹⁸

The California Air Resources Board (CARB) has estimated the costs of the In-Use Locomotive Rule to small businesses "ranges from -\$26,045 to \$543,806. At maximum, this is approximately

¹⁴ See CAL. AIR RES. BD., *Locomotive Fact Sheets*, <https://ww2.arb.ca.gov/our-work/programs/reducing-rail-emissions-california/locomotive-fact-sheets> (last visited Apr. 17, 2024).

¹⁵ 42 U.S.C. § 7543(e)(2)(B).

¹⁶ RailState, *The Ultimate Guide to Railroad Classes: Defining Class I, Class II and Class III Railroads*, <https://www.railstate.com/the-ultimate-guide-to-railroad-classes-defining-class-i-class-ii-and-class-iii-railroads/#:~:text=Railways%20in%20the%20United%20States%20are%20designated%20as,year%20Class%20III%20-%20Revenue%20less%20than%20%2420M> (last visited Apr. 17, 2024).

¹⁷ Am. Short Line R.R. Ass'n, *Short Line Overview*, <https://www.aslrra.org/advocacy/short-line-overview/> (last visited Apr. 17 2024).

¹⁸ See Short Line & Reg'l R.R. Ass'n, Comments on the Proposed In-Use Locomotive Regulation, 9 (Nov. 7, 2022), <https://www.arb.ca.gov/lists/com-attach/33-locomotive22-UjMAdVc6ACEHcwlo.pdf> ("CARB erroneously suggests that short line railroads will be able to "pass on the costs" of the Proposed Rule to their customers. Short line railroads compete directly and aggressively with trucks for freight transportation and are also subject to product and geographic competition as their customers react to proposed increased transportation rates – given this reality, regulatory costs cannot reliably be passed on to the customer.").

42 percent of their annual revenue. The maximum annual unamortized cost is \$2,700,000, representing 208 percent of their annual revenue. The average unamortized cost is \$122,679, representing 9.4 percent of their annual revenue.”¹⁹ Multiple railroad sector representatives further noted “The average California short line locomotive fleet is 8 units and, based on information provided by CARB in the Proposed Rules, the expected annual payment into that short line’s locomotive charge account would amount to as much as \$1.6M each year, while many smaller short lines in California make less than \$1.6 M in annual profit. This is an extreme financial demand on small businesses and would likely prevent smaller short lines from operating in California at all.”²⁰

CARB admits these costs could drive smaller railroads out of business, stating “[s]ome smaller Class III locomotive operators in California may face significant compliance costs. If these businesses are unable to pass on the costs of the Proposed Regulation to customers or if there is a significant change in demand for services, it is possible some of these businesses would be eliminated.”²¹ The agency goes on to state that if small railroads do face bankruptcy as a result of the In-Use Locomotive Rule that regulatory relief “may” be offered, but there is no assurance it will be.²²

Advocacy recommends the EPA require California to either exempt or minimize the impacts to small businesses in the railroad sector before authorizing the In-Use Locomotive rule.

B. The Ability of Other States to Implement the In-Use Locomotive Rule Presents a Threat to Small Locomotives Nationwide.

The Clean Air Act allows other states to implement California’s standards once they are finalized. The ability of other states to potentially implement the In-Use Locomotive Rule turns a state regulation into a de-facto national regulation. Multiple states routinely adopt California air quality regulations. For example, 17 states and the District of Columbia have implemented California’s low-emission vehicle standards, 16 states and the District of Columbia have implemented California’s zero-emission vehicle standards, and 11 states have implemented California’s advanced clean truck standards.²³ As such, the In-Use Locomotive Rule should be examined from a national perspective as opposed to a state perspective.

The nation’s rail system is, by its very nature, interconnected and runs through every state. Thus, the In-Use Locomotive Rule will have national impacts. The National Propane Gas Association, whose membership is roughly 75 percent small businesses²⁴ has already noted “The rail network

¹⁹ CAL. AIR RES. BD., PROPOSED IN-USE LOCOMOTIVE REGULATION, STANDARDIZED REGULATORY IMPACT ASSESSMENT (SRIA) (May 26, 2022),

<https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/locomotive22/appb.pdf>.

²⁰ Short Line & Reg’l R.R. Ass’n *supra* note 18, at 15. (Nov. 7, 2022).

²¹ *Id.* at 143.

²² *Id.*

²³ See U.S. DEPT OF ENERGY, *Alternative Fuels Data Center, Adoption of California's Clean Vehicle Standards by State*, <https://afdc.energy.gov/laws/california-standards#/tab-act> (last visited Apr. 17, 2024).

²⁴ See Nat’l Propane Gas Ass’n, Comment Letter on California State Nonroad Engine Pollution Control Standards; In-Use Locomotive Regulation; Requests for Authorization; Opportunity for Public Hearing and Comment, 1 (Apr 1, 2024), <https://www.regulations.gov/comment/EPA-HQ-OAR-2023-0574-0075>.

is interconnected, and with the nation’s largest economy, California is especially important. About 65 percent of the locomotive fleet goes in and out of California, meaning customers across the country depend on reliable rail service. Any hindrance to these movements, such as locomotives needing to start and stop at the border, would cost customers time and money.”²⁵

Short-line railroads account for 29 percent of freight rail in the nation.²⁶ Advocacy believes the potential disruptions which could be caused not only to small businesses in the rail sector, but in all sectors that depend on rail transport, warrant a decision by the EPA to require California to more thoroughly consider the impacts to small businesses prior to authorizing the In-Use Locomotive Rule.

III. Conclusion

Advocacy requests the EPA withhold authorization of California’s proposed In-Use Locomotive regulation until the state addresses its potential impacts on small businesses. The ability of other states to adopt the proposed rule as well as the interdependence of multiple industrial sectors on the nation’s rail system warrant the EPA directing California to thoroughly consider the small business impacts of the In-Use Locomotive Rule.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Nick Goldstein at (202) 772-6948 or by email at nick.goldstein@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Nick Goldstein
Assistant Chief Counsel
Office of Advocacy
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²⁵ *Id.* at 3.

²⁶ See Am. Short Line & Reg’l R.R. Ass’n, *The Short Line and Regional Railroad Industry*, <https://www.aslrra.org/about-us/industry-facts/> (last visited Apr. 17, 2024).

Copy to: The Honorable Richard L. Revesz, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget