



October 17, 2013

Environmental Protection Agency
EPA West (Air Docket)
1200 Pennsylvania Ave. NW.
Room B108, Mail Code 6102T
Washington, DC. 20460

RE: Docket Number: EPA-HQ-OAR-2013-0491

California State Motor Vehicle Pollution Control Standards; Tractor-Trailer Greenhouse Gas Regulation; Request for Waiver of Preemption; Opportunity for Public Hearing and Public Comment

The California Construction Trucking Association (“CCTA”) and Allen Lund Company (“ALC”) submit these comments in response to the United States Environmental Protection Agency (“EPA” or “Agency”) publication in the Federal Register on August 21, 2013 (78 Fed. Reg. 51724) a “Notice and opportunity for public comment” regarding a California Air Resources Board’s (“CARB”) request that EPA grant a waiver of preemption of the Clean Air Act (“CAA”) to enforce part of its Heavy-Duty (“HD”) Tractor-Trailer Greenhouse (“GHG”) Regulation. The CARB request pertains only to new tractors (model years 2011-2013) and new trailers (2011 and all subsequent model years).

The CCTA is the largest non-profit association of construction trucking firms in the U.S. Founded in 1941 and headquartered in Upland, California, the CCTA advocates for sensible legislation and regulations affecting our members. Our membership base is diverse and includes an interstate conference, the Western Trucking Alliance comprised mostly of property carrying motor carriers engaged in interstate commerce. Members of our interstate conference operate HD trucks and trailers and would be directly impacted by EPA approval of the requested CARB waiver.

ALC is a national third-party transportation broker with nationwide offices. Founded in 1976 and headquartered in La Cañada, California, ALC has over 350 employees working with shippers and carriers across the nation providing transport for dry, refrigerated (specializing in produce), and flatbed freight. ALC is a broker/dispatcher of trucks pulling 53-foot van style trailers and is directly affected by CARB’s HD Tractor-Trailer GHG regulation. The rule mandates California-based brokers only dispatch a HD tractor or a 53-foot or longer box-

type trailer for travel on a highway within California if the tractor or trailer complies with the applicable operating requirements and compliance deadlines. As an authorized broker of property by the U.S. Department of Transportation (US DOT - 2212129), ALC brokers shipments into the stream of interstate commerce.

The CCTA and ALC both encourage the EPA to deny CARB their requested waiver because the regulation is; (A) Arbitrary and capricious and, (B) the state does not need its own standard to meet compelling and extraordinary conditions.

CARB Regulation is Arbitrary and Capricious

EPA should deny this waiver because it fails all necessary preconditions necessary for EPA to grant the waiver. The CCTA and ALC believe the CARB HD Tractor-Trailer GHG regulation is arbitrary and capricious since CARB is attempting to regulate a commercial vehicle, in this case, 53-foot van style trailers for which there is no expressed authority in the CAA to regulate as a mobile source of emissions. Trailers are neither “motor vehicles nor a motor vehicle engine” capable of independent propulsion. Section 209 (a) of the CAA expressly states:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.(Emphasis added)

While it is true that California is the only state that can apply for a waiver under Section 209 (b) of the CAA, this request for a waiver is inappropriate because of the inclusion of trailers. To categorize a trailer as a mobile source of emissions expands the definition of what constitutes a motor vehicle beyond what is authorized under the CAA. Trailers by themselves cannot, and do not emit any emissions (unless the trailer is equipped with a Transportation Refrigeration Unit or TRU, in which case the TRU itself is already regulated by CARB). Yes, it is true that a trailer – loaded or empty – can affect the fuel mileage –and by extension GHG emissions of the tractor pulling the trailer and that is the regulatory/legal catch-22 CARB finds itself entangled with by this particular regulation - because CARB cannot regulate fuel efficiency, yet it is attempting to do so by circumventing numerous federal laws.

The alleged purpose of the CARB HD Tractor-Trailer GHG regulation is to reduce the GHG emissions associated with the operation of certain **combination** HD vehicles (“long-haul”). The reduction of GHG emissions from combination vehicles can only be accomplished through improved fuel efficiency. Neither EPA nor CARB has authority to regulate fuel efficiency (mileage). The authority to regulate fuel efficiency resides with the U.S. Department of Transportation and its modal agency, the National Highway Traffic Safety Administration (NHSTA).

A news release from CARB dated December 12, 2008 makes it clear in adopting the HD Tractor-Trailer GHG regulation CARB is engaged in the impermissible activity of regulating fuel economy. Their news release made the linkage between improved aerodynamics, **improved fuel economy**, and GHG reduction. Regardless of the semantics used by CARB to justify this regulation, any attempt to reduce GHG is linked to improving fuel efficiency (*see*: <http://www.arb.ca.gov/newsrel/nr121208.htm>). An excerpt from the news release states:

*“...the Heavy Duty Vehicle Greenhouse Gas Emission Reduction measure requires long-haul truckers to install fuel efficient tires and aerodynamic devices on their trailers that **lower greenhouse gas emissions and improve fuel economy.**” (Emphasis added)*

CARB Ignored Federal Law in Promulgating its HD Tractor Trailer GHG Regulation

CARB’s Tractor-Trailer GHG regulation effectively discriminates against all out-of-state motor carriers in violation of the both the Commerce Clause¹ to the U.S. Constitution and the Federal Aviation Administration Authorization Act (“FAAAA”)² because the regulation contains many exemptions that in practice will only apply to in-state motor carriers while “long-haul” (aka. out-of-state motor carriers) must comply or avoid doing business in the state.

The CAA cannot be treated as a “trump card” allowing environmental agencies to ignore other federal law that clearly conflicts with environmental goals. Holding out-of-state motor carriers to a different (higher) standard than in-state motor carriers invites a commerce clause challenge should EPA approve this waiver. Motor carriers otherwise perfectly legal to operate in every other state in the U.S. (with trucks purchased in compliance with EPA regulations at time of manufacture) would face the choice of complying with California regulations or foregoing any economic opportunity to haul into the state – precisely the sort of act prohibited under the FAAAA since this regulation will directly affect the prices, routes, and services of motor carriers.

The impact of this and other CARB regulations on the prices, routes, and services of motor carriers is exemplified by a new incentive plan by Mercer Transportation Company which is ranked in Transportation Topics Top 100 for-hire motor carriers as the 54th largest motor carrier in the country. Mercer is attempting to incentivize their independent contractors (owner-operators) to upgrade their trucks to comply with CARB’s statewide truck and bus regulation by offering a significant bonus and increase in compensation for those contractors willing to comply with the regulation (*see*: <http://mercertown.com/carb-compliant-trucks/>). While regulatory agencies may applaud

¹ The federal government has authority over commerce between the various states and, in so doing, relegates each of the states to regulation within its own borders (Article I, Section 8, Clause 3). Thus, state laws that directly regulate interstate commerce are unconstitutional.

² The Federal Aviation Administration Authorization Act, 49 U.S.C. §14501(c) prohibits states from adopting any law or regulation related to a price, route, or service of any motor carrier with respect to the transportation of property.

Mercer’s new policy as a progressive example of how to incentivize compliance with CARB regulations, the reality is the CARB regulation is impacting the prices, routes, and services of motor carriers in violation of the FAAAA³.

The absurdity of the regulatory scheme of the CARB Tractor-Trailer GHG regulation can best be exemplified by the simple fact that an in-state motor carrier operating a single exempted truck and trailer combination can operate 100,000 miles (or more) per year on California highways using one of the exemptions, yet a “long-haul” motor carrier from New York (or any other state) only coming into the state three times a year and traveling as few as 1,500 miles annually in the state must comply with the regulation. CARB has attempted to save itself from a commerce clause claim by including a meaningless one-time, five-day pass for a non-compliant, out-of-state combination vehicles (this is regardless of motor carrier size). It is meaningless precisely because a second trip to California requires the out-of-state motor carrier to comply with the regulation while in-state motor carriers continue to enjoy exemption from the regulation.

CARB approved numerous exemptions to its HD Tractor-Trailer GHG regulation (which encompass the vehicle model years that are the subject of this specific waiver request). Those exemptions effectively act as a “carve-out” to in-state interests. While the exemptions do not specifically prohibit an out-of-state motor carrier from exercising their use, the ability to use the exemptions for “long-haul” interstate motor carriers is miniscule – if even that. Specifically, the regulation does not apply to:

- (1) Local-haul trailers and the tractors pulling local-haul trailers,
- (2) Local-haul tractors and the trailers pulled by local-haul tractors,
- (3) Short-haul tractors and the trailers pulled by short-haul tractors,
- (4) Drayage tractors and the trailers pulled by drayage tractors,
- (5) Storage trailers and the tractors pulling storage trailers, and
- (6) Empty 53-foot and longer box-type trailers pulled by HD tractors.

Local-haul tractors and trailers are defined as those that travel exclusively within a 100-mile radius of their local-haul base. A short-haul tractor is defined as a heavy-duty tractor that travels less than 50,000 miles per year and the mileage limit includes “all miles accrued both inside and outside of California.” Finally, drayage tractors are those that operate on or through ports or intermodal rail yards to load or unload freight. With these exemptions the majority of California’s in-state motor carriers will be exempted from compliance with this regulation – the very definition of a commerce clause violation.

³ The CCTA is currently engaged in federal litigation challenging CARB’s adoption of the statewide truck and bus regulation as a violation of the FAAAA. The litigation is currently on appeal in the United States Court of Appeals for the Ninth Circuit.

CARB has attempted to claim these exemptions are warranted because many of the in-state motor carriers able to use the exemption operate within coastal metropolitan regions where overall traffic speeds are so low as to render any GHG reduction from mandating the use of only SmartWay designated trucks and trailers as not cost effective. While that argument may be true during morning or evening rush-hours where overall traffic speeds are considerably less than posted speed limits, it is not true during non-peak driving hours. Ironically, the same set of circumstance that minimizes the usefulness of aerodynamic technology to exempted motor carriers applies to those “long-haul” motor carriers which must comply.

The “carve out” also ignores that many in the California goods movement industry have migrated to working overnight hours in order to maximize productivity in a highway environment usually devoid of the congestion present during peak morning and afternoon driving hours. If the purported goal is truly the reduction of GHG, total vehicle miles of ALL truck-trailer combinations operating during non-peak hours is a key metric affecting GHG emissions – not whether they operate within a 100 mile radius or operate less than 50,000 miles annually. Those exempted motor carriers can easily operate at the same highway speeds as those “long-haul” motor carriers mandated to comply with this regulation.

Additionally, CARB’s enforcement mechanism for the regulation intends to hold others within the supply-chain responsible for ensuring compliance with the regulation. California-based brokers and shippers are included in this regulation placing an undue burden on interstate commerce by those entities needing to verify the compliance of motor carriers for which they are contracting for services.

Both the CCTA and ALC have either member motor carriers or utilize motor carriers that make infrequent trips into California. The very nature of national goods movement is random (market-driven) for many motor carriers – meaning motor carriers don’t know from week-to-week which markets they’ll serve. This is especially true when considering the movement of fresh-foods. California produces approximately half of all US-grown fruits, nuts and vegetables (see: <http://www.cdffa.ca.gov/statistics/>) and the movement to markets across the U.S. is susceptible to significant volume fluctuations based on growing seasons. Those fluctuations are dramatically evident when reviewing the USDA’s weekly Fruit & Vegetable Rate Report (we cannot supply a link at this time due to the shutdown of the U.S. Government). Granting CARB its waiver to begin enforcement of this regulation will only apply upward pressure on market-based transportation rates from non-compliant motor carriers unable to serve the California marketplace.

Does California Need Such Standards to Meet Compelling and Extraordinary Conditions?

CARB authority to regulate GHG stems from passage of AB 32 (Global Warming Solutions Act of 2006) which established California’s goal to reduce GHG emissions statewide to 1990 levels. AB 32 preceded the U.S. Supreme Court decision (*Massachusetts et al v. Environmental Protection Agency*) on April 2, 2007 that allowed

EPA to begin regulating GHG under the CAA. On December 7, 2009, the EPA Administrator signed two distinct findings regarding GHG under Section 202 (a) of the CAA which reads:

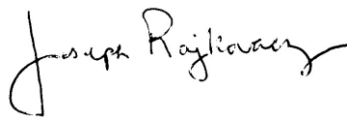
The Administrator finds that the current and projected concentrations of the six key well-mixed greenhouse gases — carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆) — in the atmosphere threaten the public health and welfare of current and future generations.

*The Administrator finds that the combined emissions of these well-mixed greenhouse gases from **new motor vehicles and new motor vehicle engines** contribute to the greenhouse gas pollution which threatens public health and welfare. (Emphasis added)*

It is clear in the EPA GHG Endangerment Finding that only “new motor vehicles and new motor vehicle engines” are defined – not new or newer trailers. To the point of whether California meets the requirement of having Compelling and Extraordinary Conditions to request this waiver, the answer clearly is “no” since the US EPA has embarked on a national program in conjunction with NHTSA to regulate GHG emissions on new HD vehicles (*see*: <http://www.epa.gov/climatechange/endangerment/>). Any California program to independently regulate GHG from HD vehicles becomes redundant and unnecessary in light of EPA’s national approach to regulating GHG from the trucking sector.

Conclusion

The EPA should deny the requested waiver for CARB to begin enforcing its HD Tractor Trailer GHG regulation because there is no authority in the CAA for it to regulate trailers and adoption of the regulation by CARB conflicts with other federal law. Additionally, since EPA is developing its own national fuel efficiency/GHG standards for newly manufactured HD vehicles, CARB is not in need of its own program that conflicts with other federal law.



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