

August 9, 2021

VIA EMAIL (elena.guilfoil@ecy.wa.gov)

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Washington Department of Ecology
Air Quality Program
300 Desmond Drive, SE
Lacey, Washington 98503

RE: Washington's Proposal to Opt-In to CARB's ACT and Omnibus Low-NO_x Rules

Dear Ms. Guilfoil:

The Truck and Engine Manufacturers Association (EMA) appreciates the opportunity to submit these comments regarding the Washington Department of Ecology's (WADOE's) proposed rulemaking to opt-in to the California Air Resources Board's (CARB) Advanced Clean Trucks (ACT) Rule, and CARB's Omnibus Low-NO_x Rule, once that rule is finalized. EMA was actively engaged in the rulemaking process for both of those California regulations.

EMA represents the world's leading manufacturers of medium-duty (MD) and heavy-duty (HD) on-highway trucks and engines. EMA member companies design and manufacture highly-customized vehicles to perform a wide variety of commercial functions, including interstate trucking, regional freight shipping, local parcel pickup and delivery, refuse hauling, and construction – to name a few. EMA member companies are investing billions of dollars to develop MD and HD zero-emission vehicles (ZEVs), and fully support expanding the market in Washington for those ZEV trucks. Indeed, EMA and its members agree that ZEVs are and need to be the future of the commercial trucking industry. However, as detailed below, state-specific opt-ins to programs designed to meet California's unique air quality needs and economic capabilities are not well-suited to the shared goal of accelerating the deployment of ZEV trucks in Washington and elsewhere across the country.

i) Washington has another year to consider opting-in to CARB's Rules

As an initial matter, the WADOE should recognize that it has until the end of 2022 to take action on the proposed opt-in to CARB's ACT Rule without violating the Clean Air Act's (CAA) two-year leadtime requirement in advance of the anticipated 2025 model year effective date. The fact that the WADOE has another full year to consider this matter stems from how the definition of "model year" applies in the context of the ACT Rule. Under the ACT Rule, the term "model year" *equates* with calendar year. As a result, Washington can defer acting on the pending opt-in initiative until next year and will still have two full "model years" (*i.e.*, calendar years) in advance of an effective date in 2025, and so will still be in compliance with the opt-in lead-time provision (Section 177) of the CAA.

The most relevant definition of “model year” is found in the ACT Rule itself. Specifically, the ACT Rule (see CCR Title 13 section 1963 (c)(15)) references a provision of CARB’s “Phase 2” greenhouse gas (GHG) regulations as providing the applicable definition of “model year.” That provision (CCR Title 17 section 95662(a)(16)) defines model year, as follows:

“Model year” means one of the following for compliance with this subarticle. Note that manufacturers may have other model year designations for the same vehicle for compliance with other requirements or purposes:

(A) For tractors and vocational vehicles with a date of manufacture on or after January 1, 2021, **the vehicle’s model year is the calendar year corresponding to the date of manufacture;** (emphasis added).

This directly applicable definition makes it clear that even though the term “model year” may have different applications for compliance with other regulatory requirements or purposes, as it relates to the ACT Rule, the term “model year” *equates* with calendar year. Accordingly, if Washington is looking to implement the ACT Rule starting in the 2025 “model year,” that implementation will, by definition, apply to tractors and vocational vehicles (which can include Class 2b-3 vehicles) manufactured in the 2025 *calendar* year. Given that, so long as Washington adopts the ACT Rule before the end of the 2022 calendar year, it will provide the requisite two-years leadtime before the start of the 2025 calendar year.

The applicable and controlling federal definition of “model year” leads to the same conclusion. The relevant EPA definition of “model year” is found in EPA’s Phase 2 greenhouse gas (GHG) regulations. Under the Agency’s Phase 2 regulations, “model year” means:

(i) For tractors and vocational vehicles [which can include Class 2b-3 vehicles] with a date of manufacture on or after January 1, 2021, **the vehicle’s model year is the calendar year** corresponding to the date of manufacture (40 C.F.R. §1037.801(i); emphasis added).

This federal regulation matches the directly applicable CARB ACT regulation, and again makes it clear that model years and calendar years are the same for these purposes.

This conclusion is further reinforced by the manner in which the ACT Rule phases-in. Under the ACT Rule, a HDOH vehicle manufacturer’s obligation to produce and sell a certain percentage of ZEV trucks in a given model/calendar year is based on the number of conventionally-fueled trucks that a manufacturer sells in that same *calendar year*. In that regard, sections 1963.1(a) and 1963.1(a) of the ACT Rule provide that:

[A] manufacturer shall annually incur deficits **based on the manufacturer’s annual sales volumes of on-road vehicles** produced and delivered for sale in California. Deficits are incurred

when the on-road vehicle is sold to the ultimate purchaser in California...

[A] manufacturer must retire a number of ZEV or NZEV credits that equals or exceeds **their total annual deficits** each model year ... (emphasis added).

Under these operative provisions of the ACT Rule, and by way of example, vehicles manufactured before the 2025 model year would not factor-in to the calculation of the ACT Rule's ZEV-truck percentage-sales requirements for the 2025 model year, since those requirements would be based on manufactures' annual vehicle sales in 2025, not before. In fact, that percentage-sales requirement could not be fully calculated until the *end* of the 2025 calendar year (again, not before) when a manufacturer's total annual sales of conventionally-fueled trucks could be calculated.

Thus, it is clear from the operative definitions, and from the manner in which the ACT Rule phases-in, that model year and calendar year are synonymous as it relates to the implementation of the ACT Rule. Consequently, it is equally clear that Washington can wait until the end of the 2022 calendar year and still provide two full years of lead-time before implementing the ACT Rule in the 2025 "model year."

There are other important reasons to defer acting on the proposed opt-in to the ACT Rule. More specifically, CARB has announced its intent to substantially revise the ACT rule in the summer of 2022 to double the Rule's ZEV-truck requirements to a 100% ZEV-truck sales mandate from and after 2040, or perhaps as early as 2035, which will amount to a major revision of the ACT Rule. (See CARB Notice of Public Workshop, dated August 3, 2021.) Washington would need to adopt those same revisions to the ACT Rule to maintain the "identity" required under the CAA. This is a significant change of circumstances. Accordingly, it only makes sense for the WADOE to wait and see what the final revised ACT Rule looks like before moving to opt-in to it, especially since waiting to assess that final rule and its impacts will not jeopardize the targeted effective date in 2025.

We agree with WADOE's conclusion that the State cannot opt-in to CARB's Omnibus Low-NO_x Rule because that rule is not yet final, and likely will not receive approval from California's Office of Administrative Law (OAL) until sometime in 2022.

ii) **CARB's ACT Rule is not well-suited to the accelerated deployment of MD and HD ZEVs in Washington**

CARB's ACT Rule will not accomplish WADOE's and other stakeholders' shared goals to accelerate the deployment of ZEV trucks. EMA's over-arching concern in that regard is that the structure of CARB's ACT Regulation threatens to hinder, not promote, the emerging market for zero-emission commercial vehicles. In brief, the ACT Rule amounts to a naked sales mandate that requires manufacturers to sell a prescribed number of zero-emission MD and HD vehicles, without any corresponding ZEV-purchase requirements. Consequently, instead of buying ZEV trucks, fleet customers may simply choose to purchase other less expensive truck technologies, or to continue maintaining their existing trucks.

MD and HD ZEVs have higher initial purchase prices (currently 2-3 times higher), higher life-cycle costs, and lower utility (*i.e.*, less cargo room than conventionally-fueled vehicles). The ACT Rule fails to consider the significant financial incentives needed to make MD and HD ZEVs an attractive investment for a trucking business. Further, the ACT Rule does not address or provide for the charging and refueling infrastructure that will be needed at fleet facilities to operate the mandated ZEVs, the build-out of which will be expensive, complicated, and time-consuming. An effective MD/HD ZEV program includes ZEV-purchase incentives and significant public investments in ZEV infrastructure build-out and related costs. The ACT Rule does not address those necessary elements, and so will not result in an effective program to spur the deployment of MD and HD ZEVs. WADOE's rulemaking proposal similarly fails to include the necessary State investments in ZEV-purchase incentives and accelerated ZEV-infrastructure development.

Washington's commercial vehicle market includes many distinct segments that each require unique vehicle configurations, and each application has a different level of suitability for HD and MD ZEVs. We estimate that there are at least 70 different market segments for Class 4 through 8 trucks in Washington, with some applications (*e.g.*, residential parcel delivery) representing reasonable targets for electrification, while others (*e.g.*, plowing snow) are much less suitable. Any analysis of the opportunities for deploying MD and HD ZEVs in Washington must consider the diverse market segments and include a robust evaluation of each one. Those segments identified as highly suitable may be considered "beachhead" markets, where zero-emission trucks can be deployed first before expanding to other market segments.

As the WADOE staff is well aware, commercial trucks are not just big cars. Unlike the passenger car market where purchasers select from a limited number of vehicle options, commercial fleets provide truck manufacturers with extensive and detailed vehicle specifications so their trucks will meet the particular demands of the fleets' unique operations in the most efficient and cost-effective manner. When a trucking company purchases a commercial vehicle, it is making a significant capital investment in business equipment that it expects to deploy in a manner that will return a profit. Trucks are amortized over longer time periods than cars, and they are assessed, not with regard to subjective criteria such as style and comfort, but solely on the objective basis of performance capability and cost-efficiency. Thus, truck purchasers' decisions turn on detailed up-front assessments of the customized truck's utility for the job at hand, as well as its purchase price, durability, operating costs, and resale value. In short, a trucking company will only invest in a new commercial vehicle when it will improve the bottom line of their business.

In light of the foregoing, the zero-emission MD and HD vehicle market in Washington will require significant incentive funding until zero-emission trucks are profitable for trucking businesses. Incentives must be sufficient to offset all of the ZEV truck life-cycle costs that will exceed current commercial vehicle costs, including: (i) higher purchase prices (2-3 times higher than conventionally-fueled trucks), and increased sales (FET) taxes; (ii) operational inefficiencies (*i.e.*, it takes more ZEV trucks to perform the work of conventionally-fueled trucks); (iii) lower residual values; (iv) required investments in new maintenance facilities, training, and parts inventories; and (v) significant investments to install and maintain the necessary charging or refueling infrastructure. Additionally, incentives must be available for an extended period of time so fleets can rely on them in implementing their long-term business plans.

The WADOE specifically needs to consider the challenges of developing the requisite charging infrastructure to support zero-emission MD and HD battery-electric trucks —something that CARB’s ACT Rule failed to do. HD charging stations cost more than \$350,000, and must be located at fleet terminals and other depots and service facilities where trucks are typically parked. In short, developing the necessary infrastructure will be complicated, expensive and time-consuming. Moreover, fleets will need to expand the charging infrastructure over time if they plan to deploy additional battery-electric trucks. Since it may take 24 to 48 months from concept to a having a fully functional charging station permitted and installed, the WADOE needs to act now to establish a primary near-term objective of incentivizing and assisting in the development of an appropriate charging infrastructure to enable the deployment of battery-electric commercial vehicles. Additionally, for fleet applications where fuel-cell electric vehicles may be the better option, hydrogen fueling stations will be needed.

A thorough assessment of what it will take to successfully deploy MD and HD ZEVs should involve a careful evaluation of data generated by existing ZEV deployments. One rich data source is the extensive pilot and demonstration projects in California. California’s Air Quality Improvement Program has funded the deployment of hundreds of zero-emission commercial vehicles in many different applications. Additionally, the ACT Fleet Forum is a network of North American fleets that deploy advanced and clean truck technologies. The ACT Fleet Forum recently provided its insights into deploying zero-emission truck technologies in comments to the California Air Resources Board.

In sum, the ACT Rule, with its unilateral ZEV sales mandates and nothing more, is not the regulatory platform on which Washington should build its program to accelerate the deployment of MD and HD ZEVs.

iii) **CARB’s Omnibus Rule is cost-prohibitive and infeasible, and should not be a component of Washington’s ZEV strategy**

While this rulemaking does not include CARB’s “Omnibus” Rule, WADOE is planning to adopt those Omnibus Regulations once they are finalized, presumably next year. Washington should not adopt or opt-in to the Omnibus Regulations for numerous reasons, including the following:

- a. The Omnibus Regulations are cost-prohibitive, with costs exceeding monetized benefits by a factor of 36 in Washington. Cost-prohibitive rulemakings with corresponding fiscal impacts are invalid, and cannot qualify for a federal preemption waiver under the federal Clean Air Act (CAA).
- b. CARB has provided insufficient leadtime under the Omnibus Regulations, which is manifestly unreasonable, and which (again) will disqualify CARB (and indirectly Washington) from obtaining a federal CAA preemption waiver for the Omnibus Regulations. The four-years of leadtime required under Section 202(3)(c) means that the earliest that the Omnibus regulations could lawfully take effect, assuming OAL approval in 2022, is MY 2027.

- c. The Omnibus low-NO_x emission standards and related requirements are inherently infeasible, especially since CARB may end up providing only one full-year of leadtime for the 2024-2026 MY standards and requirements, which, as noted, is unlawful under CAA Section 202(3)(c).
- d. CARB failed to demonstrate the feasibility of the proposed 2024-2026 MY and 2027 MY and later low-NO_x emission standards and related requirements. That is particularly true with respect to the proposed “3B-MAW” standards.
- e. The Omnibus Regulations, when coupled with the ACT Rule, will cause fleet operators in Washington to accelerate their purchases of new HD vehicles before the 2025 MY, and to refrain from purchasing new HD vehicles after the 2025 MY (a “pre-buy/no-buy” response), which will significantly diminish the assumed benefits of opting-in to the CARB Regulations.
- f. The Omnibus Regulations likely will compel some HDOH engine and vehicle manufacturers to exit the California market starting in advance of the 2024 MY, which, in turn, would result in a lack of CARB-compliant MD and HD trucks in Washington, if Washington opts-in to those regulations.
- g. If HDOH diesel trucks are forced out of the California and Washington markets as expected, that will frustrate the implementation of the ACT Rule, since the HD ZEV-sales mandates under that Rule are calculated as a percentage of new in-state HD diesel truck sales, which will be significantly reduced, if not eliminated, due to the Omnibus Regulations.

For all of the foregoing reasons, the WADOE should not include CARB’s Omnibus Regulation as an element of Washington’s strategy to promote the deployment of MD and HD ZEVs. CARB’s Omnibus Regulations will suppress the sales of CARB-compliant conventionally-fueled vehicles, which in turn will reduce the efficacy of the ACT Rule, since, as noted, the percentage-sales requirements of that rule are based on the number of sales of conventional trucks. Thus, the net effect of CARB’s Rule, if adopted in Washington, is more likely to frustrate rather than foster Washington’s objective to accelerate ZEV-truck sales.

iv) **Washington would be better served by advocating for next-tier nationwide HDOH standards as a “bridge” to ZEVs**

While we do not support the WADOE’s potential opt-ins to California’s ACT and Omnibus Regulations, EMA and its members fully recognize that zero-emission vehicles (ZEVs) are key to the future of the commercial trucking industry. Accordingly, as noted previously, EMA member companies are investing billions of dollars to develop and bring to market MD and HD ZEVs. Our efforts alone, however, will not achieve success. A broad-based transition of the trucking industry to ZEVs will take a determined and concerted effort by federal and state policymakers, manufacturers, trucking fleets, utilities, and other key stakeholders. During that period of transition, new cost-effective interim standards to reduce NO_x and GHG emissions from

conventionally-fueled trucks will be necessary to bridge the gap to the longer-term development and deployment of commercial ZEVs.

More specifically, next-tier nationwide emission-reduction regulations for conventionally-fueled trucks will be key to establishing a cost-effective bridge to heavy-duty and medium-duty ZEVs. To that end, the WADOE along with the other MOU States should work with EMA to implement next-tier nationwide EPA regulations for HD and MD vehicles and engines that include the following elements:

- Meaningful reductions in the tailpipe NO_x standard.
- New test procedures focused on reducing emissions under lightly-loaded operating conditions typical of urban centers.
- Additional NO_x control under extended idle conditions.
- Next generation “in-use” compliance-assurance protocols to control emissions over a broader range of real-world operating conditions.
- Program elements to ensure compliance over multiple years.
- Continued reduction of GHG emissions.
- Flexible emissions credits to incentivize ZEVs.

While several of CARB’s Omnibus program elements are directionally consistent with those that EMA envisions for EPA’s next-tier nationwide rule, CARB will be implementing those elements with unreasonably short timelines, questionable technical feasibility, unsustainable cost-benefit metrics, and material adverse impacts on new vehicle prices and sales volumes. The overall impacts of CARB’s new Omnibus regulations are likely to have extremely negative consequences. In that regard, commercial fleets have not reacted positively in the past to the deployment of major new emissions-control technologies on an accelerated timeline, and, as a result, we fully expect that the significant “pre-buy/no-buy” scenarios that occurred in 2007 with respect to commercial vehicles will be experienced again in California, as well as in any opt-in states.

In addition, and as noted above, commercial vehicle and engine manufacturers likely will be so overwhelmed by the scope, stringency, and timing of CARB’s new ACT and Omnibus requirements that there is a strong possibility that some major manufacturers will exit the California market. Those that remain may only be able to offer limited product options to minimize costs and risks, with many vocational markets being left unserved. At the recent Board hearing on the Omnibus regulations, CARB staff conceded that only two heavy-duty engine manufacturers have committed to even *try* to develop CARB-compliant products. States outside of California should work to avoid (not opt-in to) those types of adverse market outcomes. Otherwise, the consequences could be severe – both environmentally and economically.

If CARB-compliant products are not available in Washington, or if the market does not accept the cost associated with the few CARB-compliant products that might be available, fleet operators will accelerate their purchase of new federally-certified vehicles in Washington, or will acquire new trucks in adjacent non-opt-in states, rely more on the used truck market, or simply retain their existing fleet vehicles longer. All of those actions will have a negative impact on air quality and delay progress in the attainment of air quality and ZEV-deployment goals. In addition, to the extent that fleet operators are compelled to acquire new vehicles out-of-state, that would result in a cascading series of negative economic impacts as well. In particular, truck dealerships in Washington would face significant adverse consequences, and if Washington-based fleet operators were to choose to relocate out-of-state, significant in-state job losses would result across the wide-ranging trucking sector, including within the goods-movement, warehousing, and truck-servicing and repair sectors.

A far more effective bridge to widespread commercial MD and HD ZEV sales and deployment is through a cost-effective *nationwide* EPA-implemented lower-NO_x program. Future federally-certified lower-NO_x HD/MD engines and vehicles will ensure that businesses and municipalities in each state have access to the full range of powertrain and vehicle solutions they are accustomed to purchasing today. They will not be forced to pay premium prices for new products, to purchase outside their brand preference, or to seek purchase opportunities in neighboring states. They can maintain profitability without resorting to purchasing used, higher-emitting vehicles, or maintaining their existing fleet longer without the environmental benefits gained from new vehicle purchases.

The significant nationwide NO_x reductions from an EPA lower-NO_x program for commercial vehicles and engines would address any remaining nearer-term air quality attainment issues in Washington. To the extent that there might be other local needs to reduce emissions from NO_x “hotspots” within the State (*e.g.*, port and warehouse areas), those local needs could be best addressed through more specific approaches, such as targeted accelerated fleet turnover programs, utilization of alternative fuels, deployment of zero-emission vehicle and equipment at specific facilities, utilization of the State’s market power to purchase ZEV trucks, and other targeted incentive programs, rather than through the adverse statewide economic and environmental impacts that would result from the adoption of CARB’s Omnibus program. Accordingly, Washington and the other MOU States should work for the implementation of EPA’s next-tier HD/MD regulations as the best option for achieving their respective air quality goals during the bridge years before significant ZEV-truck market penetration takes hold.

Significant in that regard, on August 5th, the Biden Administration announced its decision to publish final next-tier emission standards for HD/MD vehicles by December 2022, with those standards taking effect in 2027. That EPA rule will be followed by “Phase 3” GHG standards taking effect in 2030, which likely will continue to accelerate the deployment of ZEV trucks on a nationwide basis. While the details of those EPA programs still need to be negotiated to ensure cost-effective outcomes, WADOE should align its programs with those inherently more effective nationwide programs.

Thus, and for this additional reason, the pending opt-in rulemakings should be deferred to allow for a thorough assessment of the efficacy of EPA's anticipated proposals.

v) **The recommended roadmap to a commercial ZEV future**

As noted, transitioning the commercial trucking industry to ZEVs demands a strategic and concerted effort by state and federal policymakers, manufacturers, trucking fleets, utilities, and others. More specifically, successfully bridging to a medium- and heavy-duty ZEV future will require the following steps:

Undertake technical and economic research to:

- Determine the level of incentives needed to overcome the financial barriers to purchasing ZEVs and converting commercial fleets to zero emissions.
- Identify the funding and other potential impediments to building out the necessary electric charging/hydrogen fueling infrastructure.
- Assess the optimal commercial vehicle market segments most suitable for the near-term deployment of ZEVs; properly prioritize and allocate resources for early deployment in those "beachhead" market segments; and establish reasonable pathways to the broader adoption of commercial ZEVs.
- Determine the optimal long-term ZEV power source for each commercial vehicle market segment and the corresponding infrastructure needs (i.e., electricity and/or hydrogen), including generation and storage.

Again, Washington should work with EMA and other stakeholders to advocate for federal action and rulemakings to implement an effective nationwide transition to ZEV trucks.

Establish practical, implementable, and effective policies to:

- Incentivize trucking fleet transitions to ZEVs.
- Accelerate the turnover/retirement of older, high-emitting commercial vehicles.
- Target the commercial vehicle applications and markets most suitable for near-term transition to ZEVs.
- Fund construction of the unique charging/fueling infrastructure needed for MD and HD ZEVs, including electricity grid modernization and decarbonization.
- Implement new EPA lower-emission standards for conventionally-fueled trucks on a nationwide basis to allow for broad near-term NO_x and GHG reductions, and implement an appropriate emissions-credit program to encourage the longer-term transition to commercial ZEVs.
- Utilize carbon neutral liquid and gaseous fuels for interim GHG reductions.

vi) **Various legal issues could preclude Washington’s opt-in to CARB’s ACT and Omnibus Rules**

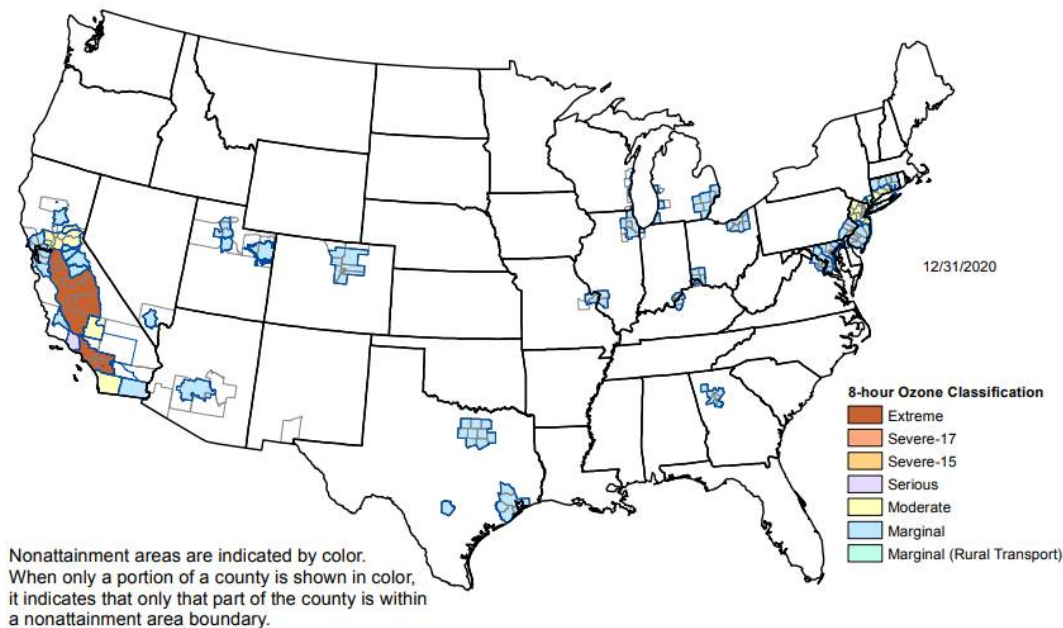
In addition to the numerous policy reasons that argue against opt-ins to CARB’s inherently California-centric rules, there are a number of potential legal and procedural issues that may preclude Washington from opting-in to CARB’s ACT and Omnibus Low-NO_x Rules. More specifically, Washington likely does not meet the opt-in criteria in Section 177 of the federal CAA. It also appears that Washington likely will not be able to justify the fiscal impacts of adopting CARB’s Rules.

(a) **The Requirements of the Clean Air Act**

1. **Washington likely does not meet the opt-in criteria of CAA Section 177**

Washington is in attainment with the 2008 national ambient air quality standards (NAAQS) for ozone (75 ppb), and with the current 70 ppb ozone NAAQS. In that regard, EPA has not designated any portion of Washington as a nonattainment area with respect to the 70 ppb ozone standard. (See EPA Ozone Nonattainment Area Map, below.) As the WADOE confirms on its Ozone Pollution home page, “by the mid-90s, all of Washington met the national ozone standard.” Indeed, the current ozone monitoring data from the Washington Trucking Network confirms that ozone levels across the State consistently meet the 70 ppb standard.

8-Hour Ozone Nonattainment Areas (2015 Standard)



Section 177 applies only in those instances where a State that is in nonattainment with a NAAQS (i.e., for ozone) needs to include more stringent California standards as SIP measures to demonstrate NAAQS-attainment. That is not the case here, so section 177 does not apply.

The specific terms of CAA section 177 (42 U.S.C. §7507) are as follows:

New motor vehicle emission standards in *nonattainment* areas

Notwithstanding section 7543(a) of this title [the CAA section relating to the preemption of state standards] **any State with plan provisions approved under this part** [“Part D - Plan Requirements for *Nonattainment* Areas”] may adopt and enforce for any model year standards relating to the control of emissions from new motor vehicles or new motor vehicle engines and take such other actions as are referred to in section 7543(a) of this title respecting such vehicles if —

- (1) Such standards are identical to the California standards for which a [preemption] waiver has been granted for such model year; and
- (2) California and such State adopt such standards at least two years before commencement of such model year (as determined by regulations of the Administrator). (Emphasis added.)

The foregoing statutory language clearly provides that the option for States to utilize section 177 is limited to those States that have EPA-approved SIPs and that need to include more stringent California standards as SIP provisions in order to bring the States’ nonattainment areas into attainment with the applicable NAAQS, including for ozone. The heading to section 177 – “New motor vehicle emission standards in **nonattainment** areas” – reinforces that conclusion. In that regard, CAA section 171(2) (42 U.S.C. § 7501(2)) defines a nonattainment area to mean “for any air pollutant, an area which is designated ‘nonattainment’ with respect to that pollutant.” Given that definition, a State that is demonstrating compliance with the NAAQS through an EPA-approved “maintenance plan” would not be eligible for an opt-in under Section 177, since the submission of a maintenance plan applies to a State “which *has attained* the national primary ambient air quality standard for that pollutant.” (42 U.S.C. § 7505a.)

The Second Circuit Court of Appeals has reinforced the foregoing conclusion, noting that “[i]t was in an effort **to assist those states struggling to meet federal pollution standards** that Congress directed in 1977 that other states could promulgate regulations requiring vehicles sold in their state to be in compliance with California’s emission standards.” Motor Vehicle Manufacturers Ass’n v. New York State of Dept. of Environ. Conservation, 17 F.3rd 521 (2nd Cir. 1994). (Emphasis Added.) “Section 177 was inserted into the Act in 1977 **so that states attempting to combat their own pollution problems could adopt California’s more stringent emission controls.**” Id.

The relevant legislative history of section 177 also makes it clear that opt-ins to California’s mobile source standards are only available to States that need to utilize California standards to address persistent NAAQS-nonattainment issues. More specifically, as explained in the 1977 House (Report No. 95-294), CAA section 177 was initially referred to as “Section 221” in the proposed 1977 amendments to the CAA. In its explanation of Section 221 (now, Section 177), the

House Committee stated that “a State which is subject to the [new] vehicle inspection and maintenance requirements [I/M] of [proposed] section 208 of the [1977 CAA amendments] is authorized to adopt and enforce new motor vehicle emission standards which are identical to California standards for which a waiver is given under section 209(b) of the act.” (H.R. 95-294, p. 431.) Significantly, the application of proposed section 208, which mandated that States adopt I/M programs, was expressly limited to the “29 air quality regions **predicted to exceed the national primary ambient air quality standards.**” In other words, the House understood and intended that the option to adopt California standards was limited to those States that would be in nonattainment but for their inclusion of California’s more stringent standards in their SIPs. (*Id.* at 224.) The House Committee Report went on to note as follows:

[T]he Committee is concerned that preemption [of state standards] (section 209(a) of the Act) now interferes with legitimate police powers of the States, prevents effective protection of public health, and limits economic growth and employment opportunities **in non-attainment areas for automotive pollutants.**

Id. at 244 (emphasis added).

The accompanying Senate Report (S.R. 95-127) for the relevant amendments to the CAA in 1977 contained similar statements regarding the scope and availability of CAA section 177. Of particular note in that regard is the statement of Senator Anderson:

One issue of particular concern to me is the limitation in section 209 of the waiver from the State preemption provision for automobile emission standards only for the State of California I believe, **communities and States with substantial cleanup problems** should be allowed the option of protecting the public in their jurisdiction **by requiring accelerated cleanup [through California standards].** (S.R. 98-127, p.93.) (Emphasis added.)

Thus, the relevant House and Senate Reports demonstrate that the potential opt-ins envisioned under what would become CAA section 177 were intended to apply only to those States that were still predicted to be in nonattainment with the NAAQS, and so were compelled to adopt more stringent California mobile sources standards as components of their accelerated NAAQS-attainment efforts, specifically as plan provisions in their SIPs. The underlying premise for California’s ability to seek a waiver of federal preemption under section 209(b) of the CAA is that the State faces “**compelling and extraordinary**” air quality challenges. (42 U.S.C. §7543(b)(1)(B).) That same premise necessarily carries over under section 177 for potential opt-in States as well. Where a State does not face its own similar compelling and extraordinary air quality needs, the opt-in afforded under Section 177 – and the implicit waiver of the otherwise controlling provisions of federal preemption that apply for vehicles designed to move in interstate commerce – is simply not available.

It is clear from all of the foregoing that a State’s opt-in to California regulations under Section 177 is authorized only when the California regulations at issue are necessary components

of the State's NAAQS attainment demonstration. That is simply not the case here. Washington is in full attainment with the relevant NAAQS.

Accordingly, Washington cannot and will not rely on any potential opt-ins to demonstrate attainment with the current ozone NAAQS, and in fact, Washington has been in attainment with the current standard for years. The net result is that since Washington does not need to use opt-ins to CARB's Rules as SIP provisions to demonstrate ozone attainment, Washington is not authorized to opt-in to those California regulations under CAA section 177.

2. Section 177 does not authorize opt-ins to CARB's GHG standards

EPA has directly addressed the question of whether CAA section 177 authorizes States to opt-in to CARB regulations directed at the reduction of greenhouse gas (GHG) emissions, as opposed to criteria pollutants for which NAAQS have been established, and for which States have specific attainment obligations under the CAA. EPA concluded that States cannot use section 177 to adopt CARB GHG-oriented regulations. More specifically, EPA has concluded that "CAA section 177 is in fact intended for NAAQS attainment planning and not to address global air pollution." (84 FR 51351.) Washington is not authorized to contradict that determination of section 177's scope.

Since CARB's ACT Rule is a regulation principally aimed at reducing GHGs, as is Washington's opt-in rulemaking, Washington is not authorized to opt-in to the ACT Rule under CAA section 177.

(b) CARB's Rules are cost-prohibitive

In any rulemaking, costs and benefits should be assessed in a thorough manner. In this case, the costs of Washington's opt-ins to CARB's ACT and Omnibus Rules would far outweigh any putative benefits from doing so. This is another important reason for deferring action of this rulemaking.

EMA previously engaged independent experts to assess the costs and benefits of CARB's Omnibus Rule, both as applied in California and as potentially applied in the other 49 States. ACT Research assessed the incremental costs of CARB's Rule on a per-truck basis, and NERA Consulting quantified the potential corresponding public health benefits on a per-truck basis.

ACT Research found that, based on new truck sales volumes in California, CARB's Omnibus Low-NO_x Rule would increase the price of a new truck in California by approximately \$58,000, using a 7% discount rate. Since new truck sales volumes in Washington are significantly less than in California, using that per-truck cost increase to assess the cost of Washington's potential opt-in to the Omnibus Rule is a conservative approach.

On the benefits side, NERA quantified the public health benefits (*i.e.*, avoided premature deaths) that could be attributed to the reductions in ozone and secondary PM emissions from implementation of an Omnibus Rule, and then calculated those benefits on a per-truck basis, both for California and for States outside of California as well. For Washington, those benefits amount

to approximately \$1,600 per-truck (\$1,500 per-truck from secondary PM reductions, and \$100 per-truck from ozone reductions), using a 3% discount rate.

Comparing the likely benefits and costs in Washington from an opt-in to CARB's Omnibus Low-NO_x Rule yields a cost-benefit ratio (or a negative benefit-cost ratio) of approximately 36-to-1, on a conservative basis. Rulemakings that would have such extremely inverted economic consequences cannot meet the criteria for valid administrative regulations. And that is even before the other downstream consequences of a potential opt-in are taken into account.

More specifically, ACT Research found that given the substantial per-truck cost increases that will result from the Omnibus Low-NO_x Rule, it can be expected that truck fleet operators (in addition to retaining their current vehicles longer, or buying new vehicles out-of-state) will accelerate their purchases of new trucks before the Omnibus Rule takes effect (a "pre-buy"), and will refrain from buying new trucks after the Omnibus Rule takes effect (a "no-buy"). The likely net result will be that the anticipated pre-buy/no-buy will shift more than 40% of the new truck market to accelerated purchases prior to the implementation of the Omnibus Rule, which will proportionally and significantly dilute any potential benefits from the CARB Rules, including under the ACT Rule, since the extent of the ZEV-sales mandate is derived from the level of sales of conventionally-fueled trucks.

In addition, it can be anticipated that once the Omnibus Rule takes effect in Washington, truck dealerships in the State will see their businesses suffer, long-haul fleet operators may choose to move out-of-state, and trucking-related job losses will occur. All of those adverse outcomes will only compound the already upside-down cost-benefit calculus for the contemplated opt-in.

In sum, opting-in to CARB's Omnibus Low-NO_x Rule would be cost-prohibitive. The calculus for CARB's ACT Rule is similar if not even more inverted. Since such opt-ins are not authorized under CAA section 177 to begin with, it seems clear that Washington is not justified to adopt and opt-in to CARB's Rules.

vii) Conclusion

There is no doubt that ZEVs are the future of the commercial trucking industry, and the roadmap discussed above identifies realistic and necessary steps to develop and bring to market medium- and heavy-duty ZEVs. Policymakers and other stakeholders should collaborate on those targeted and holistic nationwide strategies to successfully establish the commercial ZEV market. EMA and its members have already begun aggressively moving down the road toward a ZEV future. In the meantime, a complementary nationwide EPA bridge program is needed — and is in the works — to reduce NO_x emissions from conventionally-fueled commercial vehicles.

Increasing the market penetration of ZEV trucks requires the iterative and multi-pronged approach spelled out in our roadmap, including, among other things: (i) identifying the trucking fleet applications best-suited to a nearer-term transition to ZEV trucks — the "beachhead" markets; (ii) implementing robust incentive programs to enable the identified beachhead fleets to acquire and maintain ZEV trucks; (iii) researching and building-out the necessary ZEV infrastructure to support the beachhead ZEV fleets; and (iv) coordinating with other agencies, including EPA, to

expand the deployment of ZEV trucks across other applications, using sufficient public resources and incentives to expand the necessary ZEV infrastructure and offset the higher total cost of ownership of commercial ZEVs.

CARB's ACT and Omnibus Low-NO_x Rules are not well-suited to implementing the necessary multi-prong approach, or to achieving our common goal for the accelerated deployment of MD and HD ZEV trucks. Rather, those Rules impose both infeasible ZEV-sales mandates on manufacturers (without accounting in any way for the necessary incentives and infrastructure deployment, and without including any corresponding ZEV-purchase strategies), and also establish unreasonably stringent, expensive and infeasible NO_x standards. As a result, a ZEV-deployment strategy that is centered around CARB's Rules will more likely frustrate rather than foster the acquisition and use of ZEV trucks in Washington, will hurt the State's economy, and will impede any envisioned environmental gains (i.e., due to delayed fleet turnover or increased out-of-state truck purchases). The roadmap that EMA has outlined offers a better and more collaborative way forward.

We look forward to further discussions regarding these critically important issues, and stand ready to assist the WADOE in advancing a cost-effective program to accelerate the roll-out of ZEV-technology trucks and lower-emission commercial vehicles.

Respectfully Submitted,

TRUCK AND ENGINE
MANUFACTURERS ASSOCIATION