

**STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY**

Proposed Amendments to Chapter 173-423 WAC, Clean Vehicles Program;) **Notice Date:**
Proposed Implementation of) **September 7, 2022**
California's Omnibus Low-NO_x) **Public Hearing Date:**
Regulations) **October 12, 2022**

**COMMENTS OF THE
TRUCK AND ENGINE MANUFACTURERS ASSOCIATION**

October 18, 2022

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1. Introduction

The Truck and Engine Manufacturers Association (EMA) appreciates the opportunity to submit comments regarding the Department of Ecology’s (DOE’s) proposed adoption of regulatory amendments to implement Washington’s opt-in to the California Air Resources Board’s (CARB’s) Omnibus Low-NO_x Regulations (the “Omnibus” regulations).

EMA represents the world’s leading manufacturers of heavy-duty on-highway (HDOH) trucks and engines, the types of mobile sources that are regulated under the Omnibus Regulations. 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. Importantly, EMA member companies are investing billions of dollars to develop HDOH zero-emission vehicles (ZEVs), and fully support expanding the market in Washington for those heavy-duty ZEVs. EMA and its members agree that ZEVs are and need to be the future of the commercial trucking industry. However, the DOE’s proposed implementation of CARB’s Omnibus Regulations will not foster or accelerate the transition to ZEV trucks in Washington. Rather, the proposed implementation is far more likely to upend the HDOH market in Washington and will undermine the implementation of the DOE’s recently adopted Advanced Clean Trucks (ACT) regulations, which will similarly disrupt and undermine the deployment of ZEV trucks in the State.

EMA acknowledges that the DOE’s proposed implementation of CARB’s Omnibus Regulations is dictated by state statute – specifically, RCW 70A.30.010. Nonetheless, grounds exist to *pause this rulemaking* to seek further direction from the Legislature on this matter because: (i) the U.S. Environmental Protection Agency (EPA) is currently finalizing more cost-effective nationwide low-NO_x regulations for HDOH vehicles and engines; (ii) it remains unclear whether the Omnibus Regulations will receive a preemption waiver from EPA because those regulations fail to provide the four years of leadtime mandated under the federal Clean Air Act (CAA); and (iii) the Omnibus Regulations are infeasible and cost-prohibitive, and likely will lead to significant pre-buys/no-buys and “product blackouts.” Accordingly, as explained more fully below, DOE should defer action on this matter pending further consultation with the relevant legislative committees.

2. EPA is finalizing nationwide HDOH low-NO_x regulations that will fulfill the objectives of the Omnibus Regulations in a more feasible and cost-effective manner

On March 28, 2022, EPA published a notice of proposed rulemaking (NPRM) to adopt a comprehensive suite of new low-NO_x regulations for HDOH vehicles and engines. (See NPRM for EPA’s “Clean Trucks Plan” (CTP), 87 FR 17414-17888.) EPA intends to finalize that CTP rulemaking before the end of this year – within the next two months – and the finalized HDOH low-NO_x standards will take effect starting with the 2027 model year (MY).

By law, EPA’s final very-stringent CTP low-NO_x regulations will achieve the greatest feasible reductions in HDOH engine and vehicle emissions, taking costs and other important considerations into account. At the same time, because EPA’s regulations will reflect the emissions test data and results that have been developed over the two years since CARB first proposed the Omnibus regulations, the CTP regulations will be more feasible and cost-effective than CARB’s, and will ensure that new HDOH vehicles and engines will remain available for purchase in Washington. While the CTP regulations will not take effect until MY 2027, that is not a significant issue in this case, since the DOE’s proposed Omnibus implementation would not take effect until 2026 – a difference of only one model year. In addition, it is well-established that national standards are far more effective than state-specific requirements for regulating HDOH vehicle and engine emissions, since those sources are inherently designed for and utilized in interstate commerce. Further, nationwide standards mitigate the potential pre-buy/no-buy impacts of new HDOH emissions standards, and are far more cost-effective, since the attendant regulatory costs can be allocated across national sales volumes as opposed to much lower state-specific sales.

Accordingly, DOE should defer implementing the Omnibus Regulations pending the promulgation of EPA’s final CTP regulations, and pending further consultation with the Legislature on this matter.

3. The Omnibus Regulations likely are ineligible to receive a preemption waiver from EPA

Deferral of the DOE’s proposed Omnibus-implementation also is warranted because those regulations likely are ineligible to receive a preemption waiver from EPA. In that regard, EPA is still in the process of determining whether to grant a preemption waiver for the Omnibus regulations. CARB adopted the Omnibus Regulations on September 9, 2021. Those regulations take effect starting in model year 2024. Thus, CARB has only provided two model years of leadtime (MYs 2022 and 2023) for the Omnibus Regulations. That is inconsistent with the applicable provisions of the CAA, which mandate four years of leadtime for HDOH regulations. Accordingly, it is anticipated that EPA could deny some or all aspects of CARB’s waiver request.

i. The relevant provisions of the CAA

The relevant provisions of the CAA include sections 209(b)(1) and 202(a). Under section 209(b)(1), EPA cannot grant a waiver of the broad federal preemption applicable to state emission-control standards for new motor vehicles and new motor vehicle engines “if the Administrator finds that,”

- (A) the determination [that the State’s standards will be, in the aggregate, at least as protective of public health welfare as applicable federal standards] is arbitrary and capricious,
 - (B) such State does not need such State standards to meet compelling and extraordinary circumstances, or
 - (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) [section 202(a)] of this title.
- (42 U.S.C. §7543(b)(1).)

It is the third articulated preemption-waiver criterion — the express requirement that CARB’s standards must be “consistent with” section 202(a) — that lies at the heart of this matter. In that regard, it should be noted that CAA section 209(b)(1)(C) refers on its face to all of subsection 202(a), not just certain paragraphs.

CAA section 202(a)(1) is the statutory provision that grants EPA the general authority to establish emission standards for all classes of new motor vehicles and engines. Section 202(a)(2) then specifies that any such EPA standards for new motor vehicle or motor vehicle engines under section 202(a)(1),

shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(42 U.S.C. §7521(a)(2).)

Paragraph (3) of subsection 202(a) contains specific requirements for any emissions standards applicable to new *HDOH vehicles and engines*. And subparagraph (C) (section 202(a)(3)(C)) specifically requires that emission standards promulgated under paragraph (3) applicable to new HDOH vehicles and engines must provide minimum leadtime and stability periods:

(C) Lead time and stability

Any standard promulgated or revised under this paragraph [CAA section 202(a)] and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years [the HDOH “stability” period] beginning no earlier than the model year commencing 4 years after such revised standard is promulgated [the HDOH “leadtime” period].

(42 U.S.C. §7521(a)(3)(C).)

Thus, to be “consistent with” the relevant preemption waiver provision of the CAA, CARB’s HDOH standards, including the Omnibus Regulations, must provide four years of leadtime. CARB has failed to do that, so the Omnibus Regulations are inconsistent with the CAA, and so ineligible for a preemption waiver.

A governing legal principle is directly applicable to this matter. More specifically, federal statutes must be construed to give full effect to their plain meaning, and when statutes are unambiguous the plain language of the statute controls, without the need to explore any matters beyond the clear terms of the statute, including legislative history. See United States v. Barnes, 295 F.3d 1354, 1359 (D.C. Cir. 2002) (“If the language of the statute has a ‘plain and unambiguous meaning,’ our inquiry ends so long as the resulting ‘statutory scheme is coherent and consistent.’” (quoting United States v. Wilson, 290 F.3d 347, 352 (D.C. Cir. 2002))). In this instance, the relevant provisions of the CAA are clear and unambiguous. In order for CARB to receive a preemption waiver for its HDOH emission standards, those standards must be “consistent with section 7521(a) [202(a)]” of the CAA. That requirement for consistency with section 202(a) refers to all of section 202(a); it does not limit the requisite consistency to only certain subparagraphs, nor does it contain any exclusions or carve-outs for CARB. Just as consistency with section 202(a)(2) requires that all CARB standards for all classes of motor vehicles and engines provide sufficient leadtime for technology development, section 202(a)(3)(C) requires at least four years of leadtime and three years of stability for any standard “applicable to classes or categories of *heavy-duty vehicles or engines*.” (Emphasis added.)

Since the CARB HDOH regulations at issue fail to provide that mandated four years of leadtime and/or the three-year period of stability, they are inconsistent with section 202(a), and thus ineligible for a waiver of federal preemption under CAA section 209(b)(1)(C).

ii. The relevant precedent

The conclusion that CARB’s HDOH regulations must provide four years of leadtime and three years of stability is supported by federal case law and by EPA’s own prior waiver determinations. More specifically, in American Motors Corporation v. Blum, 603 F.2d 978 (D.C. Cir. 1979), the D.C. Circuit held that where Congress has specified a minimum leadtime period for certain types of mobile source standards — in that case, the specific minimum two-year leadtime provided under CAA section 202(b)(1)(B) for certain light-duty NO_x standards applicable to small-volume manufacturers — CARB is required to comply with that same specified leadtime in order to be eligible for a waiver of preemption. As explained in Blum, a contrary construction of the statute would allow California to deny manufacturers “the lead time that Congress has found to be necessary. We must reject an interpretation that would permit such a frustration of congressional purpose. The necessity for leadtime cannot be obviated by a waiver.” 603 F.2d at 981.

EPA consistently has followed the D.C. Circuit’s reasoning in Blum, and has explicitly addressed the applicability of section 202(a)(3)(C) to California as a requirement to obtain a waiver under section 209(b). More specifically, EPA issued a memorandum on September 16, 1994, signed by then-Assistant Administrator Mary Nichols and docketed in support of the Agency’s waiver decision, that expressly concluded that CARB must comply with the Congressionally-mandated four-year leadtime provision of section 202(a)(3)(C) in order for CARB’s HDOH regulations to be consistent with CAA section 202(a) and to qualify for a preemption waiver. See Decision Document, Sept. 16, 1994, pp. 30, 32. EPA’s explanation of that conclusion bears repeating:

EPA disagrees with CARB’s conclusion [that Blum is not applicable to its heavy-duty regulations]. EPA believes that Blum indicates that California would be required to provide the statutory leadtime required under section 202(a)(3)(C) for its proposed gasoline and diesel standards.

* * *

EPA believes this case to be similar to the facts in Blum in that Congress specified a specific amount of leadtime to be provided for heavy-duty manufacturers. The Congressional concern for adequate leadtime for manufacturers under certain conditions must be incorporated by California in determining the adequacy of leadtime to permit the development of new technology to meet new requirements.

* * *

The Blum court concluded that . . . a Congressional mandate of a specific amount of leadtime should be grafted into section 202(a) and that the California standards may not be inconsistent with this required leadtime. Given that Blum decision, *EPA believes that the heavy-duty leadtime requirement, already a part of section 202(a), should be provided in order for California standards to be considered consistent with section 202(a).*

(*Id.* at pp. 26, 28, 29-30 (emphasis added). See also 46 FR 22032, April 15, 1981, where EPA held that when Congress has specified a leadtime period, California “must make provision for the extra leadtime Congress itself found necessary.”)

Notably, the conclusion that CARB must comply with the statutorily-specified leadtime requirement is even more apparent here than in Blum because—as EPA acknowledged in the 1994 memorandum—the four-year leadtime requirement applicable to HDOH engines and vehicles is specified in section 202(a)(3)(C), and thus is “already a part of section 202(a).” In contrast, the leadtime requirement at issue in Blum was not stated expressly in section 202(a) (rather, it was contained in section 202(b)(1)(B)), but the D.C. Circuit nevertheless found that the Congressionally-specified leadtime requirement was implicitly incorporated into section 202(a)(2).

CARB’s pending waiver request relates to HDOH regulations that fail to provide the mandated four full model years of leadtime. Based on the unambiguous terms of the CAA and the applicable controlling precedent, EPA cannot and should not grant those waiver requests. The net result is that the DOE also cannot, and so should not, take steps to implement CARB regulations that are ineligible to receive the requisite preemption waiver.

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

It is now clear beyond any legitimate dispute that CARB’s Omnibus Regulations are neither feasible nor cost-effective. As a result, there is a valid basis to defer action on this

rulemaking pending consultation with the relevant legislative committees. In that regard, this matter is fundamentally different from the DOE's rulemaking last year to opt-in to California's Advanced Clean Trucks (ACT) regulations. In that case, there were legitimate differences of opinion about whether the ACT opt-in was premature given the readiness of the necessary infrastructure and incentive funding to enable the accelerated deployment of ZEV trucks. In this case, however, and for the reasons explained below, there is no question that opting-in to the Omnibus regulations will do more harm than good.

First and foremost, as noted, U.S. EPA will be finalizing within the next two months a comprehensive and stringent suite of nationwide low-NO_x regulations for new HDOH engines and vehicles. Those nationwide CTP regulations will take effect starting with the 2027 model year, just one year after the Omnibus regulations would take effect in Washington under the DOE's opt-in proposal. Importantly, the CTP regulations will mirror the Omnibus regulations in all key aspects – new dramatically lower NO_x and PM standards; new low-load NO_x standards; new “binned” moving-average window (MAW)-based in-use standards; enhanced on-board diagnostic (OBD) standards; and significantly extended useful life and emissions warranty requirements – but will do so in a likely feasible and far more cost-effective manner. As a result, EPA's nationwide CTP regulations will yield greater HDOH emission reductions in Washington than could be achieved under a state-specific implementation of the infeasible Omnibus regulations.

Second, it has become increasingly clear that the Omnibus regulations are, in fact, infeasible and cost-prohibitive. More specifically, two years have passed since CARB first proposed the Omnibus Low-NO_x requirements. During that time, Southwest Research Institute (SwRI), the expert emissions-research laboratory engaged by both CARB and EPA, has conducted additional emissions testing of the low-NO_x “Stage 3” prototype engines and aftertreatment systems that are the technical bases for the Omnibus and CTP regulations. Those additional tests have shown, among other things, that: (i) CARB's proposed in-use “Bin 3” emission standard is infeasible under various test cycles, as well as at the proposed extended useful life and emissions warranty mileages; (ii) CARB's standards provide no allowance or compliance margin to account for engine/aftertreatment component and manufacturing variances, or to reflect the impacts of in-use ambient operating conditions, including ambient temperatures and in-use fuel-quality issues; (iii) CARB's proposed idle emission standard is not fully achievable; (iv) CARB's standards would compel additional measure to ensure higher exhaust temperatures under low loads, which will increase CO₂ emissions; and (v) under cold ambient temperatures, the NO_x emissions from the “Stage 3” prototype increase by 0.04 g/bhp-hr (or more), which is 2-times more than CARB's proposed primary NO_x standard (0.02 g/bhp-hr). Significantly, in light of these more recent technical developments, EPA has rightly concluded that a full nationwide implementation of CARB's Omnibus standards is not feasible. Perhaps even more significant, it appears that the DOE has not conducted any due diligence of its own regarding these important intervening technical developments, but instead appears to be relying on CARB's out-of-date and incomplete analysis from more than two years ago. That approach is insufficient to support the state's proposed implementation of the Omnibus regulations.

Third, multiple studies have shown that Omnibus-compliant HDOH trucks could cost approximately \$45,000 more than trucks certified to more feasible nationwide low-NO_x standards. Those per-truck cost increases, when assessed against the potential emission disbenefits from

trying to implement CARB's Omnibus requirements in Washington, demonstrate that the DOE's opt-in cannot not be justified through any fair assessment of cost-effectiveness.

Fourth, because of the now-confirmed infeasibility of CARB's standards, it is likely that manufacturers will not produce CARB-compliant HDOH trucks for sale in Washington as of the 2026/2027 model year. Consequently, it is highly likely that there will be significant shortages (or "product blackouts") of new trucks available for sale in Washington State to truck dealers and truck operators as of 2026/2027. Moreover, because of the price differential for any new CARB-compliant trucks that might become available, it can be expected that the Washington HDOH truck market will engage in the largest-ever "pre-buy" of new trucks before the DOE's opt-in can take effect, and will refrain from buying new trucks in Washington thereafter. Other potential options will be for truck operators to buy their new trucks outside of Washington or to simply hold on to their current trucks longer. The net result will be diminished returns in terms of emission reductions, and a wholesale undermining of the DOE's earlier opt-in to CARB's ACT program, since the mandated number of ZEV-truck sales under the ACT regulations is dependent on and derived from the number of sales of conventionally-fueled new trucks in Washington. If that number drops to zero or near-zero in Washington in 2026/2027, so too will the mandated number of ZEV-truck sales. All of that runs directly counter to the state's goal of accelerating the transition to ZEV trucks.

And fifth and finally, any marginal difference between the stringency of the infeasible CARB Omnibus regulations and EPA's anticipated nationwide CTP regulations is wholly insufficient to support any implementation of the Omnibus requirements. For example, if we assume that EPA settles on: a primary single-step low-NO_x standard that is marginally higher than CARB's fully phased-in standard of 0.020 g/bhp-hr; extended emissions warranty and useful life mileages that are marginally lower than those established by CARB (including CARB's 800,000 mile useful life requirement that will require a very costly mid-life replacement of aftertreatment systems); a 2-bin in-use emission testing protocol instead of CARB's 3-bin approach; and reasonable variability allowances to make the new standards achievable in practice, as opposed to CARB's refusal to allow for any compliance margins – none of those marginal differences would reduce the comparative benefits of Washington's alignment with EPA's nationwide standards. To the contrary, those nationwide standards will yield greater benefits in Washington because new low-NO_x trucks will continue to be available for sale, the ACT program will continue to be implemented, the pre-buy/no-buy impacts will be avoided, and the HDOH vehicle fleet will continue to turnover in a cost-effective manner toward a ZEV-truck future.

In sum, we can discern no sufficient reason to support any continuing efforts to implement CARB's Omnibus regulations. At the same time, there are multiple compelling reasons against any such course of action.

5. Washington would be better served by aligning with EPA's Clean Trucks Plan

As explained above, commercial vehicle and engine manufacturers likely will be so overwhelmed by the scope, stringency, and timing of CARB's Omnibus requirements that there is a strong likelihood that several major manufacturers will exit the California market. Indeed, at the CARB Board hearing on the Omnibus regulations, CARB staff conceded that only two heavy-duty engine manufacturers committed to even *try* to develop CARB-compliant products for the first

years of the Omnibus program. Significantly, *no manufacturer* has confirmed more recently that CARB-compliant products will be available. Similarly, *no commitments* – not any – have been made by any OEM regarding the availability CARB-compliant products for the 2027 model year and beyond. States outside of California should work to avoid (not implement) 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 substantially increased costs 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 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 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 HDOH sales and deployment is through the more cost-effective nationwide lower-NO_x CTP regulations that EPA will be finalizing within the next two months. Future federally-certified lower-NO_x HDOH 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 EPA's CTP low-NO_x program for commercial vehicles and engines will 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.*, ports), those local needs could be best addressed through more specific approaches, such as targeted accelerated fleet turnover programs, deployment of zero-emission vehicles and equipment at specific facilities, utilization of the State's purchasing and contracting power to acquire ZEV trucks, and other targeted incentive programs, rather than through the adverse statewide economic and environmental impacts that would result from the implementation of CARB's Omnibus program. Accordingly, Washington should work to align with EPA's CTP regulations as the best option for achieving the State's air quality goals during the bridge years before significant ZEV-truck market penetration takes hold.

6. Conclusion

The proposed implementation of CARB's Omnibus Regulations should be deferred because: (i) EPA is poised to finalize more cost-effective nationwide low-NO_x regulations within the next two months; (ii) the Omnibus Regulations are likely ineligible to receive the requisite preemption waiver from EPA, and thus are likely invalid; and (iii) the Omnibus Regulations are infeasible and cost-prohibitive, such that their implementation would materially disrupt the new HDOH vehicle market in Washington, which in turn would frustrate the deployment of HD ZEVs in the state.

In light of the foregoing, DOE should consult with the relevant legislative committees to allow for a reconsideration of the underlying policy position that provided for the adoption of CARB's regulations. Pending that consultation process, DOE should defer taking any further action on this matter.

Respectfully Submitted,

TRUCK AND ENGINE
MANUFACTURERS ASSOCIATION