

COMMENTS

Requesting U.S. Environmental Protection Agency Determination That CARB's Advanced Clean Fleets Regulation For Drayage Trucks Is A Transportation Control Measure Authorized By, and Not Pre-Empted By, the Clean Air Act

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I. INTRODUCTION.

A. Action Requested. These comments are submitted in response to U.S. EPA's notice¹ announcing its intention to act on the request from California for a waiver of federal pre-emption to allow the California Air Resources Board (CARB) to proceed with implementation of its Advanced Clean Fleets (ACF) regulations which include separate sections that 1) govern the purchase and sale of new vehicles for various fleets of medium and heavy duty vehicles (M/HDVs), and 2) restrict the operation of "in-use" vehicles that transport cargoes to and from California seaports.

Commenters contend that the section of CARB's ACF Regulation governing the "in-use" operation of "Drayage Trucks" is within the scope of a statutory "transportation control measure" (TCM) authorized pursuant to Title I, section 108(f)(1) of the Clean Air Act (Act or CAA), and is **not** a "standard relating to the control of emissions from new motor vehicles" pre-empted under section 209(a) of the Act. We ask EPA to determine that no waiver of federal pre-emption is required before California may commence implementation and enforcement of the rule governing the "in-use" operation of drayage trucks, or before other States may adopt and enforce identical or similar control measures as part of a State's control strategy to reduce emissions from existing registered or licensed motor vehicles. The 1990 CAA Amendments explicitly authorize States to adopt "programs to limit or restrict the use of motor vehicles in downtown areas or other areas of emission concentration" to control emissions that cause or contribute to violations of national ambient air quality standards (NAAQS) for ozone, PM2.5, NO2 and other transportation-related pollutants. Accordingly, we ask that EPA determine that the Drayage Truck section of CARB's ACF regulation is a TCM authorized by Congress, and not federally pre-empted under the CAA.

Commenters believe that other sections of the ACF regulation that govern either the purchase of new medium and/or heavy duty vehicles (M/HDVs) by fleet operators, or the sale of new M/HDVs by manufacturers, establish emission standards within the scope of federal pre-emption in section 209(a). We support the grant of a waiver for those sections of the ACF regulation because they are needed for California to meet the "compelling and extraordinary conditions" consisting of extreme violations of national air quality standards that prevail in portions of California where over 20 million Americans reside.

B. Background.

California adopted the ACF Regulation in 2023 as part of its control strategy for attaining national ambient air quality standards in the South Coast Air Basin. The regulation adds four

¹ 89 Fed. Reg. 57,151 (July 12, 2024).

new sections to Title 13, Code of California Regulations, that establish requirements governing the purchase, sale and operation of medium and heavy duty vehicles (M/HDVs), including 1) sections 2013 – 2013.4 setting emission standards for the purchase of new M/HDVs by State and Local government agency fleets; 2) sections 2015 – 2015.6 setting standards for the purchase of new M/HDVs for Federal and high priority Fleets, 3) section 2016 setting standards for the sale by manufacturers of 100% Zero Emission trucks beginning in 2036; and sections 2014 – 2014.4 requiring the operators of “in-use” M/HDVs that provide drayage services to sea ports to transition to zero emission trucks beginning in 2024.

CARB submitted all four parts of the ACF regulation to EPA with a request for a waiver from federal pre-emption pursuant to section 209(b) of the Clean Air Act (CAA).² These Comments are submitted to request that EPA determine that sections 2014 – 2014.4 of the regulation governing the operation of “in-use” drayage trucks are a “transportation control measure” (TCM) authorized under section 108(f)(1) of the CAA, are **not and do not enforce** an emission “standard” for *new* motor vehicles governed by Title II of the CAA, and therefore are not pre-empted by section 209(a) of the CAA and do not require a waiver of federal pre-emption before the Drayage Truck regulation may be implemented under State law.

II. EXECUTIVE SUMMARY.

The 72 million American children, elders and families who live within 200 meters of a major freight truck corridor, the 10 million school children who attend schools within the elevated pollution adjacent to major truck corridors, and the additional millions living or attending school near sea ports, airports, railyards, intermodal transfer facilities and other destinations served by fleets of diesel trucks, suffer from a greater incidence of the adverse health outcomes caused by exposure to the complex array of pollutants emitted by mobile sources than other communities. Communities that suffer the adverse health impacts of exposure to elevated levels of mobile source pollution in hot-spot zones near transportation facilities need the ability to protect themselves by advocating for the adoption of programs like the California Drayage Truck rule which is designed to phase out the operation of polluting, fossil-fueled internal combustion (ICE) vehicles by allowing only zero emission vehicles to carry cargoes to and from California’s sea ports.

The 130 million American children, elders and families who live within the 52 areas designated non-attainment for ozone also need the ability to reduce NOx emissions from on-road motor vehicles beyond the reductions that will be achieved by EPA’s new standards for light, medium and heavy duty vehicles. Recent ozone monitoring data demonstrate that many large urban ozone nonattainment areas are reporting deteriorating ozone air quality in contrast to the improved air quality achieved in the South Coast AQMD and the San Joaquin Valley Air District in California where marked improvements have been achieved by the replacement of ICE vehicles with zero emission vehicles (ZEVs).

To empower exposed communities nationwide to advocate for health benefits similar to those that will be achieved for the residents near the transport corridors that serve California’s ports, and to promote the improved ozone air quality achieved by the accelerated conversion of truck

² 42 U.S.C. § 7543.

fleets to zero emission technologies in California, commenters ask EPA to determine that the Drayage Truck rule is a “transportation control measure” (TCM) under section 108(f)(1)(A)(vii) of the Clean Air Act which authorizes States and local governments to adopt “programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration....”

TCMs authorized under Title I of the Act to reduce aggregate emissions from in-use vehicles are not pre-empted by Title II. TCMs are not “standards related to the control of emissions from **new** motor vehicles” under Title II which States are federally pre-empted from adopting. On the contrary, Congress authorized and required that TCMs be implemented when necessary to achieve the emission reductions from existing vehicles that are needed to attain national ambient air quality standards (NAAQS) within the statutory deadlines.

California submitted its Advanced Clean Fleets (ACF) regulation to U.S. EPA as part of its State Implementation Plan’s (SIP) control strategy for attaining the ozone NAAQS, along with a request for a waiver of federal pre-emption. The regulation includes both the Drayage Truck rule that phases out the operation of polluting in-use vehicles when carrying cargo to/from the ports, and other sections that establish standards for new motor vehicles purchased by fleet operators, or sold by truck manufacturers.

States other than California are pre-empted from adopting standards limiting emissions for **new** vehicles unless California adopts more protective standards and EPA grants a waiver of federal pre-emption.³ Then the Act allows other States to adopt standards “identical” to California’s.⁴ This scheme for pre-empting State action is limited to standards for **new** motor vehicles which are defined as “a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser”⁵ After a vehicle has been acquired by the final owner and registered or licensed for operation on the public roads, it is no longer a “new motor vehicle” subject to the requirements for “standards” under Title II.

The Act’s pre-emption section expressly declares that “the right” of States and political subdivisions to “control, regulate or restrict the use, operation or movement of registered or licensed motor vehicles” is not pre-empted.⁶ By declaring “programs to limit or restrict vehicle access to downtown areas or other areas of emission concentration” as a TCM listed in Title I for the control of aggregate emissions from the in-use operation of motor vehicles, Congress clearly intended that such programs are not pre-empted under Title II.

Commenters ask EPA to determine that CARB’s Drayage rule, and similar measures to control air pollution from motor vehicles: 1) are not pre-empted under Title II, 2) do not require a federal waiver before they may be implemented by a State; 3) are a TCM that may be adopted by any State or local jurisdiction and enforced without first being adopted by California; and 4) are not governed by the requirement in section 177 that other States must adopt a standard “identical” to California’s.

³ 42 U.S.C. § 7543(b).

⁴ *Id.*, § 7507.

⁵ *Id.*, § 7550(3) (definition of “new motor vehicle”).

⁶ 42 U.S.C. § 7543(d).

A determination by EPA that the Drayage Truck rule is a TCM, and not pre-empted under § 209(a) as a “standard relating to the control of emissions from new motor vehicles,” will provide clarity for communities around the nation that their State has the authority to protect families from the ravages of air pollution on their health by adopting programs to require truck fleet operators to transition to clean vehicles by limiting or restricting the in-use operation of polluting medium and heavy duty vehicles.

Such a determination will also bring such regulations within the scope of specific statutory authority enacted by Congress which is necessary for such measures to satisfy the Supreme Court’s recent case law requiring that major policy choices be explicitly authorized by Congress, and ensure that the Drayage truck regulation may be implemented even if SCOTUS decides that CAA § 209 violates the “equal footing” doctrine for States under the Constitution.

To support this determination, we provide a detailed review of the history of congressional efforts to control vehicle emissions under the CAA to demonstrate that limiting or restricting the operation of polluting vehicles is one of the strategies that Congress understood is necessary to attain NAAQS, was expressly authorized by the 1990 CAA Amendments to implement policy objectives first identified in 1970, and is not pre-empted under Title II.

III. Why At-Risk Communities Need to Adopt In-use Restrictions on Heavy Duty Polluting Vehicle Operations.

A. Who Is Harmed?

Treating the Drayage Truck rule as a pre-empted standard under Title II will harm communities who now suffer, and are at-risk of continuing to suffer, adverse health impacts as a result of their exposure to harmful levels of air pollution emitted from transportation sources at facilities where mobile sources congregate and emissions are concentrated.

These comments are submitted on behalf of communities in California and nationwide who are exposed to pollutants emitted from mobile sources that are known to cause or contribute to serious adverse health effects including excess deaths and incidence of cardiovascular disease, respiratory diseases, asthma, impaired fetal and childhood development and other afflictions that disrupt or diminish the enjoyment of a productive useful life. These communities include, but are not limited to –

1) residents who reside, students who attend school and persons who recreate near ports, airports, rail yards and heavily trafficked highways who are disproportionately exposed to elevated concentrations of the harmful mix of both criteria pollutants and toxic air pollutants emitted from mobile sources in the vicinity of transportation facilities where mobile sources and their emissions are concentrated; and

2) people who live, work and play in the 220 counties designated nonattainment for ozone, and the counties that will be designated nonattainment for the new annual standard for PM2.5, where they are exposed to concentrations of ozone or PM2.5 that violate the NAAQS where mobile sources are the primary source of the pollutants that contribute to the formation ground-level ozone, i.e., nitrogen oxides (NOx) and volatile organic compounds (VOCs), and fine particles.

Without effective action to achieve the emission reductions from motor vehicles needed for attainment of the NAAQS for PM_{2.5} and ozone, and to minimize exposures to toxic mobile source air pollutants, many at risk groups will suffer harm. EPA's review of the NAAQS for ozone and particulate matter have identified groups especially at risk from vehicle pollution, including--

- Babies and children, whose bodies are rapidly developing,
- Pregnant women who risk increased premature birth and low weight births when exposed to vehicle pollution.
- Children who develop asthma.
- Children and adults with asthma who suffer asthma attacks.
- People with existing respiratory diseases including COPD, COVID-related breathing limitations, long-COVID, and people with active COVID or respiratory infections.
- People with lung cancer or other chronic diseases including other cancers.
- People with or at risk for cardiovascular disease.
- Elders (over age 65) who risk premature death with exposure to air pollution.

Throughout EPA's recent rulemakings to establish emission standards for medium and heavy duty vehicles and its rulemaking to make the PM NAAQS more protective, the Agency recognizes that people of color and low income families are overrepresented in the communities most at risk from exposure to air pollution, and suffer an incremental health burden as a result of that exposure.

In its review of the PM NAAQS, EPA found that Black and Hispanic communities are exposed to higher concentrations of PM, and suffer more severe health outcomes from a given exposure regime.

There is strong evidence for racial and ethnic disparities in PM_{2.5} exposures and PM_{2.5}-related health risk, as assessed in the 2019 ISA and with even more evidence available since the literature cutoff date for the 2019 ISA and evaluated in the ISA Supplement. There is strong evidence demonstrating that Black and Hispanic populations, in particular, have higher PM_{2.5} exposures than non-Hispanic White populations (U.S. EPA, 2019a, Figure 12–2; U.S. EPA, 2022a, Figure 3–38). Black populations or individuals that live in predominantly Black neighborhoods experience higher PM_{2.5} exposures, in comparison to non-Hispanic White populations. There is also consistent evidence across multiple studies that demonstrate increased risk of PM_{2.5}-related health effects, with the strongest evidence for health risk disparities for mortality (U.S. EPA, 2019a, section 12.5.4). There is also evidence of health risk disparities for both Hispanic and non-Hispanic Black populations compared to non-Hispanic White populations for cause-specific mortality and incident hypertension (U.S. EPA, 2022a, section 3.3.3.2).⁷

EPA acknowledges that one of the reasons Black and Latinex populations are more at-risk from PM pollution is that those populations are more exposed to vehicle pollution. Vehicle pollution inequitably harms Black and Latinex communities that are much more likely compared to

⁷ 88 Fed. Reg. 5558, 5592 (January 27, 2023).

whites to reside near heavy truck traffic on highways, and at truck terminals, ports and distribution centers. For the development of tighter emission standards for medium and heavy duty vehicles, EPA conducted surveys to determine the relative contribution of truck emissions to the incremental exposures experienced by Black and Hispanic communities.

To compare demographic trends, we sorted 2045 baseline air quality concentrations from highest to lowest concentration and created two groups: Areas within the contiguous United States with the worst air quality and the rest of the country. We found that in the 2045 baseline, the number of people of color living within areas with the worst air quality is nearly double that of non-Hispanic Whites.

EPA NPR, Emission Standards for medium and Heavy Duty Vehicles.⁸ EPA recognizes that PM emissions from transportation sources are a primary contributor to the incremental incidence of adverse health outcomes experienced by at-risk communities. In the truck standards rulemaking, EPA found that --

... concentrations of many air pollutants are elevated near high-traffic roadways, and populations who live, work, or go to school near high-traffic roadways experience higher rates of numerous adverse health effects, compared to populations far away from major roads.⁹

EPA determined that more than 1 in 5 Americans live in the elevated pollution zone adjacent to heavily trafficked freight routes.

EPA also conducted a study to estimate the number of people living near truck freight routes in the United States.¹⁷³ Based on a population analysis using the U.S. Department of Transportation's (USDOT) Freight Analysis Framework 4 (FAF4) and population data from the 2010 decennial census, an estimated 72 million people live within 200 meters of these freight routes.¹⁰

In addition, EPA "estimate[s] that about 10 million students attend schools within 200 meters of major roads."¹¹

For the truck standards rulemaking, EPA conducted a demographic analysis of populations exposed in the near-highway environment.

Relative to the rest of [4423] the population, people living near FAF4 truck routes are more likely to be people of color and have lower incomes than the general population. [H]omes with a non-White householder were 22–34 percent more likely to be located within 300 feet of these large transportation facilities than homes with White householders. Homes with a Hispanic householder were 17–33 percent more likely to be located within 300 feet of these large transportation facilities than homes with non-Hispanic householders.¹²

⁸ 88 Fed. Reg. 4310 (January 24, 2023).

⁹ 88 Fed. Reg. 4422.

¹⁰ 88 Fed. Reg. 4324.

¹¹ *Id.*

¹² *Id.*, 4423.

These communities have suffered greater harm to health from past and current exposures caused by elevated concentrations of mobile source pollutants near transportation facilities. Future exposures to harmful mobile source pollutants will not be reduced during the next 10 years because more stringent emission standards for PM and ozone precursors do not apply until 2027, and then will slowly reduce aggregate fleet emissions only after new cleaner vehicles replace enough polluting vehicles already on the road.

Significant reductions in truck fleet emissions will occur where polluting vehicles are replaced by zero emission vehicles. EPA's national emission standards for new vehicles do not require manufacturers to produce and sell zero emission trucks (ZETs). The standards create incentives to make clean vehicles by setting aggregate emission standards to be achieved by each manufacturer's annual sales. EPA standards will begin to create significant incentives for the sale of ZETs after 2030 when EPA estimates that one-in-three new trucks will be zero emission. Most, if not all, zero emission trucks will be sold in States that adopt California's Advanced Clean Truck standards which mandate the sale of increasing numbers of ZETs beginning in 2030 and increasing to 100% of sales by 2036. As a result, the large number of polluting trucks that EPA's standards allow will be sold and operated in States that do not adopt the California standards to require the sale of ZETs.

Near-highway community exposures to vehicle pollution will be significantly reduced only after 2035, and primarily in states that adopt California's zero emission truck standards. At-risk communities in states without zero emission standards need the ability to seek protection from these exposures by demanding the adoption of restrictions or limitations on the operation of polluting diesel and gasoline engines in medium and heavy vehicles.

B. Why At-Risk Communities Need Targeted, Local Control Measures to Phase Out Polluting M/HDVs.

Diesel trucks and buses are major sources of deadly air pollutants. Medium and heavy-duty diesel engines emit more than 60% percent of the deadly particle pollution from motor vehicles. Particle pollution cuts short tens of thousands of US lives per year and contributes to the heavy burden of asthma on our nation's children. HD diesel vehicles are the primary source of particles in communities near heavily-trafficked highways where 72 million Americans are exposed to harmful concentrations.

NOx and VOCs from M/HDVs combines with heat and sunlight in the atmosphere to form ground level ozone, or smog, a lung irritant and asthma trigger. Heavy duty vehicle emissions are a major contributor to urban smog in the 220 counties where ozone pollution concentrations violate national air quality standards.

Had EPA followed California's approach to set zero emission standards for new M/HDVs by 2036, at-risk communities across the nation could have been confident that significant reductions in truck emissions would be achieved soon after 2030 as dirty vehicles are replaced with increasing numbers of zero emission trucks, and that all new trucks added to the fleet after 2036 would be clean. But EPA has not set zero emission standards for any new vehicles. Instead EPA set emissions standards that allow manufacturers to continue to sell polluting vehicles for the foreseeable future provided that aggregate emissions targets are met.

Given EPA's failure to set standards that will phase out polluting trucks nationwide, at-risk communities need the option to advocate for State and local control measures that will phase out the in-use operation of polluting trucks.

1. EPA Air Quality Modeling Shows New Truck Emission Standards Will Allow New Polluting Trucks to Contribute to Continuing PM NAAQS Violations.

EPA conducted emissions modeling to estimate the emission reduction benefits that would be achieved by the proposed NOx and PM standards for medium and heavy duty trucks, and a more detailed county-level modeling analysis to estimate the impact that the final NOx standards for light and medium vehicles would have on urban ozone air quality,

The modeling analysis performed for the proposed medium and heavy duty truck rule demonstrates that even as late as 2045 the proposed emission reductions would not be sufficient to provide for attainment of the 2012 national ambient air quality standard for PM2.5 (NAAQS) in 10 counties with 23 million residents, and will be within 10 % of the 2012 NAAQS in 8 more counties. 88 Fed. Reg. 4421, Table VII-2.

The final rule, issued only for HD trucks, required less NOx reduction than the proposed standards, and would provide less incentive for manufacturers to sell zero emission vehicles as part of their product mix. By inducing fewer zero emission truck sales, the final rule would achieve less air quality benefit for both PM and ozone than the zero emission truck population used in modeling the proposed rule. EPA did not rerun the air quality model to reflect the weakening effect of changes in the final HDV rule.

In addition, the PM2.5 NAAQS was revised in 2024 from 12 µg/M³ to 9 µg/M³.¹³ At this level the 8 counties modeled to be close to the old NAAQS in 2045 will be designated nonattainment along with many other counties. In addition, many more areas will be close to a nonattainment designation. Under the revised NAAQS, at least the 18 counties with the highest modeled concentrations and likely many others will remain in nonattainment between now and 2045 even after implementation of the more stringent emission standard for trucks.

Furthermore, the large scale national modeling performed for the truck rule does not address the localized impacts experienced by the 72 million Americans who live within 200 meters of heavily trafficked freight routes or the residents near ports, airports and rail yards: "the spatial resolution of the air quality modeling is not sufficient to capture very local heterogeneity of human exposures, particularly the pollution concentration gradients near roads..." *Id.*, 4310.

This means that many communities near transportation facilities in hundreds of other counties not flagged by EPA's regional scale models can be expected to experience localized violations of the revised annual NAAQS for PM2.5. Other communities in areas attaining the NAAQS, but close to the standard, will also be at risk of suffering from unlawful levels of pollution if facilities are expanded to attract more mobile sources that add more pollution to current levels.

2. Ozone Modeling Shows Continuing NAAQS Violations.

¹³ 89 Fed. Reg. 16,202 (March 6, 2024).

EPA’s modeling for the proposed truck rule also shows that the proposed NOx emission standards for trucks will not be sufficient to attain the ozone NAAQS by 2045 in large metropolitan areas where 28 million Americans will continue to be exposed to unhealthy smog concentrations. 88 Fed. Reg. 4420, Table VII-1.

EPA’s 2022 modeling of ozone attainment performed as part of the analysis of the benefits expected from adoption of NOx emission standards for medium and heavy duty trucks shows that at least five nonattainment areas with major ports, airports and large vehicle fleets, including the South Coast AQMD, San Joaquin Valley, San Diego and New York metropolitan area will remain in ozone nonattainment until 2045, well-beyond the statutory deadline for attainment. Other metropolitan areas that are projected to marginally attain the NAAQS in 2045, will remain in violation of the NAAQS well beyond the applicable statutory deadlines for attainment.

Another round of national ozone modeling was performed for the final rule to adopt Multipollutant Standards for Light and Medium Duty Vehicles in 2024.¹⁴ EPA’s modeling confirmed that standards will not reduce emissions enough to provide for attainment in South Coast and other ozone nonattainment areas. Where the 2022 modeling only estimated NOx reductions from heavy duty vehicle fleets, the modeling performed for EPA’s multipollutant rulemaking included the NOx reductions that are expected from both the multipollutant standards for light and medium duty vehicles and the reductions expected from implementation of standards for heavy duty vehicles contained in CARB’s Advanced Clean Trucks rule in California and other states where that rule has been adopted under CAA § 177.

EPA performed a national ozone modeling analysis for 2055 using estimates of the difference in NOx and VOC emissions expected from two regulatory scenarios: (i) a fleet that will meet 2026 standards vs. a fleet that will meet the final 2027-32 standards. The results are reported in the **Regulatory Impact Analysis (RIA)**, at p. 7-7:

Table 7-1 summarizes the change in total onroad emissions between the reference scenario and the policy scenario in calendar year 2055 as modeled for air quality analysis.

Table 7-1: Total onroad emissions impact in AQM policy scenario in 2055

Pollutant	Reference Scenario (tons/yr)	Policy Scenario (tons/yr)	Change in Emissions (tons/yr)	Percent Difference
PM2.5	34,667	26,342	-8,325	-24%
NOX	403,861	319,169	-84,692	-21%

The ICE portion of the fleet in 2055 will continue to emit large volumes of NOx. EPA’s modeling analysis demonstrates that expected NOx emissions in 2055 will prevent metropolitan areas from attaining the ozone NAAQS. Ozone modeling results are reported in **RIA 7.4.2**:

¹⁴ 89 Fed. Reg.

As shown in Figure 7-10, the majority of the design value decreases in 2055 are less than 1 ppb. A total of 538 counties were modeled to estimate projected design value changes; the mean impact of the rule on 8-hour ozone design values in these counties is a decrease of 0.4 ppb.

The maximum projected decrease in 8-hour ozone design value in 2055 is 1.2 ppb in Los Angeles, Riverside, and San Bernardino Counties, California. The number of counties with projected design values above the level of the NAAQS is less certain than the average projected changes in design values. That said, these modeling results project that the rule will not have an impact on the number of counties that are projected to be above and below the level of the 2015 ozone NAAQS.

Even though the 2027-32 rule achieves a 21% reduction in NO_x emissions by 2055 compared to the fleet that would comply with the 2026 standards, that reduction achieves little ozone benefit because most of the claimed NO_x reduction offsets the increased NO_x emissions from growth in the vehicle fleet by 2055 and increased VMT.

EPA's modeling also does not account for the effect that State adoption of the full suite of CARB standards will have on the distribution of polluting trucks sold between now and 2055. States that adopt the CARB Advanced Clean Truck rule and the ACF rule (assuming a waiver is granted) will phase out the sale of new polluting ICE trucks by 2036. Seventeen states are moving toward adoption of the CARB standards. The impact will be that the sale of ICE trucks by 2036 will only be allowed in the 33 states that do not adopt the CARB rules. Emissions from ICE trucks will be concentrated in the states that do not adopt the CARB standards. A large fraction of total zero emission truck (ZET) sales will be mandated by states that adopt the CARB standards. EPA has not investigated the impact that this skewed distribution of polluting vehicles will have on vehicle emissions and ozone attainment in metropolitan areas with large locally based and interstate fleets of HDVs such as Harris County, TX, Atlanta, GA, Phoenix AZ, Salt Lake City, UT.

Ozone concentrations are expected to continue violating the NAAQS in both the South Coast and San Joaquin air basins because of NO_x emissions from out-of-state trucks that are not governed by CARB's Advanced Clean Trucks standards. Air quality modeling performed for California's SIP for the 2015 Ozone NAAQS demonstrates that NO_x emitted from out-of-state trucks is one of three major source sectors that will interfere with attaining the ozone NAAQS. Elders Climate Action submitted comments on the proposed M/HDV standards asking that EPA phase out NO_x emissions from out-of-state trucks by adopting national zero emission standards on a schedule comparable to CARB's Advanced Clean Truck standards to achieve the NO_x reductions needed for attainment in South Coast. But EPA did not adopt standards that would eliminate NO_x emissions from this source sector. As a result, additional measures will be needed to eliminate this source of emissions to attain the ozone NAAQS in South Coast.

As a result of EPA's inadequate standards for LD, MD and HDVs, families in at-risk communities near transportation facilities, and in ozone and PM_{2.5} nonattainment areas where M/HDV emissions are a major contributor to NAAQS violations, will raise another generation of millions of children in polluted air that will impair their health all their lives.

Counties in South Coast, San Joaquin Valley and other States with ozone nonattainment areas will need additional control measures to achieve the reductions needed to attain the NAAQS by the statutory deadline. To achieve additional emission reductions beyond the reductions expected from EPA's current suite of tailpipe standards, States and communities will need the freedom to adopt strategies that require fleet operators to phase out the operation of polluting vehicles in areas where pollutant concentrations create unacceptable health risks for exposed communities.

C. Why Granting a Waiver Does Not Protect At-risk Communities.

Granting a waiver for the Drayage Truck section of the ACF rule will provide needed protection for at-risk communities near California's ports, but will block protections for communities near other destinations served by M/HDV traffic. If EPA treats the Drayage truck rule as a standard relating to the control of emissions from new vehicles by granting a waiver, then any State or community seeking to adopt a control strategy with a similar measure must meet the requirement of section 177 that "such standards are identical to the California standards for which a waiver has been granted"¹⁵

This requirement will impose a complete barrier to the adoption of a regulation restricting in-use polluting vehicles from serving destinations other than sea ports. Heavy truck traffic serves many other destinations in addition to sea ports where local communities are exposed to elevated concentrations of vehicle emissions. Examples include river ports along the Mississippi and Ohio Rivers, ports on the Great Lakes, market centers such as Hunts Point in the Bronx, trucks transporting cargo and passenger vans and buses serving major airports, railyards and intermodal transfer stations near airports and sea ports that are the immediate destination for cargoes arriving in the U.S. by air and sea that are then trans-shipped to final destinations in the U.S. Rules establishing slightly or significantly different zero emission requirements for in-use operations of trucks serving these destinations would be barred as not "identical" to the CARB drayage rule.

Other States would be barred from adopting rules that apply to destinations other than seaports, that establish different start dates for application of the rule, different target dates for transitioning to zero emission vehicles, or applying a zero emission mandate to some fraction of the heavy duty vehicles serving major destinations rather than all vehicles. The "identical" standards test would prevent other states from tailoring their programs to provide time for local fleet operators to transition to clean vehicles, or to apply the program to certain classes of vehicles or to trucks providing specific types of service other than drayage.

To avoid these obstacles that would flow from the obligation to comply with § 177, EPA needs to make clear that States and local governments are authorized to limit or restrict the operation of polluting vehicles as a TCM, and that such strategies are not pre-empted by CAA section

¹⁵ 42 U.S.C. § 7507(1).

209(a), or subject to the requirement that they be “identical” to a CARB regulation for which a waiver has been granted. The applicable test must be whether control measures are sufficient to provide for attainment, not whether they are identical to CARB’s regulation.

EPA’s modeling analysis of the air quality benefits expected from emission standards issued this year for new M/HDVs demonstrate that the national emission standards will not provide the protection that many communities need. New standards do not apply until the 2027 model year, and then will take nearly a decade before enough old polluting vehicles are replaced to achieve noticeable reductions in aggregate fleet emissions. At-risk communities need protection now. The CARB drayage rule provides a model regulatory strategy that demonstrates how progress toward that protection can be achieved this decade.

Communities need the freedom to craft strategies to meet local needs. That freedom is available if EPA determines that such strategies are a TCM under Title I. If EPA determines that the Drayage rule is a standard for new vehicles under Title II, other states will be denied the flexibility to develop similar programs.

For that reason, at-risk communities ask EPA to determine that the drayage rule may be implemented without a waiver because it is (1) not pre-empted as a standard for new vehicles under section 209(a), and is a TCM that CARB may implement now without a waiver. Granting a waiver for the rule will allow California to proceed with implementation, but create a significant barrier for other at-risk communities around the Nation to seek adoption of similar control measures aimed at converting polluting fleets of trucks and buses to zero emission technologies.

IV. California Qualifies for a Waiver Under Section 209(b).

A. ECA Supports Traditional Interpretation of Criteria for Granting a Waiver.

For the sections of the ACF regulation that require a waiver because they establish standards for the sale of new vehicles by manufacturers, or the purchase of new vehicles by fleet operators, ECA supports EPA statement that it intends to apply the “traditional” interpretation of the statutory criteria for granting a waiver. We understand that the decision to grant a waiver will be based on the need for more stringent vehicle emission standards to attain the NAAQS for ozone and/or PM.

We believe that such interpretation is both required by the language and legislative history of the CAA, and necessary to avoid the “equal sovereignty” attack on § 209 being litigated by States in the Petition for Certiorari currently pending in the Supreme Court. *Ohio v. U.S. EPA*, No. 24-13.

In an *amicus* brief filed in support of petitioner Ohio, the *amici* concede that Congress may enact legislation that imposes disparate burdens on States provided that the “evil” to be remedied is locally present in the State that is treated differentially.

To pass equal sovereignty muster, Congress “must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions.” *Shelby Cnty.*, 570 U.S. at 553.” Those conditions must take the form of “local evils” present in the jurisdictions that bear the burden of discriminatory regulation. *Nw. Austin Mun. Utility Dist. No. One. v. Holder*, 557 U.S. 193, 203 (2009) (quoting *Katzenbach*, 383 U.S. at 328–29). Where such an evil is present, “any departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem it targets.” *Id.*

Amicus Brief of IOWA, IDAHO, NEW HAMPSHIRE, NORTH DAKOTA, SOUTH DAKOTA, TENNESSEE, VIRGINIA, AND WYOMING, at 8. But they argue that the waiver granted by EPA does not satisfy the criteria for disparate treatment because it is based on the need for standards to address climate change which is a global problem not unique to California.

In the case of § 209 Congress recognized that California suffered from unique “compelling and extraordinary conditions” that justified exempting California from federal pre-emption of its authority to establish more stringent vehicle emission standards. Congress required that EPA “shall ... waive application of this section ... if the State determines that that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.”¹⁶ EPA may deny a waiver for any specific standard only if EPA finds that –

- (A) the determination of the State is arbitrary and capricious,
- (B) such State does not need such State standards to meet compelling and extraordinary conditions, or
- (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

If EPA interprets the “compelling and extraordinary conditions” test in section 209(b) as addressing unique air quality conditions in California, and the evidence in the record demonstrates a reasonable basis for determining that such conditions exist, then EPA should grant the waiver, and section 209(b) of the Act should survive judicial scrutiny under the “equal sovereignty” case law.

B. Air Quality Data and Health Effects Research Supports Finding of “Compelling and Extraordinary Conditions.”

The air quality conditions in the South Coast AQMD and the San Joaquin Valley qualify as “compelling and extraordinary” because of the impact that ozone and PM_{2.5} concentrations above the level of the NAAQS (“exceedance days”) have on human health, and the extreme number of exceedance days to which 20 million residents are exposed annually.

1. Daily Concentrations Exceeding the NAAQS Cause Significant Adverse Health Effects.

¹⁶ 42 U.S.C. § 7543(b)(1).

EPA has established an 8-hour NAAQS for ozone and a 24-hour NAAQS for PM2.5 because the health effects research demonstrates that daily exposures to concentrations at the level of the NAAQS cause significant adverse health impacts on exposed populations. The number of days a population is exposed to concentrations above the NAAQS is a highly relevant factor in determining the relative public health significance of one exposure regime compared to other exposure regimes. Using this metric, the adverse health effects caused by the extreme exposure regimes experienced by residents in the South Coast AQMD and the San Joaquin Valley are “compelling and extraordinary” compared to any other population in the U.S.

As part of its review of the health effects research for the 2015 ozone NAAQS, EPA’s Clean Air Science Advisory Committee (CASAC) found that every day when ozone concentrations reach the level of the national ambient air quality standard (70 ppb), 8 to 20% of all children will experience a reduction in lung function deemed adverse to the health of an asthmatic child.¹⁷ When ozone concentrations reach 75 ppb, only 5 ppb above the standard, from 11% to 22% of all school aged children will experience at least one such an event, and 1 to 6% of children will experience such adverse health events for 6 or more days. Both the percentage of children experiencing harmful effects and the number of days those effects persist after an exposure, continue to increase as ozone concentrations are elevated further above the level of the NAAQS. In most nonattainment cities, ozone levels routinely exceed 80 ppb, but in the South Coast and San Joaquin air districts, 8 hour concentrations frequently exceed 100 ppb, and peak days reach 110 ppb.

Children who suffer debilitating asthma attacks miss school or even require urgent care or emergency department interventions. When children miss school days, their education is disrupted and students fall behind which contributes to high school dropout rates. Childhood asthma, autism and impaired cognitive development linked to pollutant exposures all contribute to failed educational achievement, which in turn is strongly correlated with lower lifetime income, poor health histories, difficulty recovering from COVID and shorter lifespans.

An estimated 4.5 children reside in the South Coast and San Joaquin air districts based on the national data. As of 2018, the U.S. Census estimates that 22.4% of the U.S. population are under 18 years of age: <https://www.census.gov/quickfacts/fact/table/US/PST045218>. The CDC reports that “About 1 in 10 of all children have asthma, and about 1 in 6 (17%) of non-Hispanic black children had asthma in 2009.” Given the large BIPOC populations in both South Coast and the San Joaquin Valley, more than 500,000 children are at risk of suffering significant to severe asthma effects on each day above the ozone NAAQS.

In its review of the health effects research, EPA’s *Integrated Science Assessment* found compelling evidence that populations exposed to elevated ozone will experience other adverse

¹⁷ “CASAC Review of the EPA’s *Second Draft Policy Assessment for the Review of the Ozone National Ambient Air Quality Standards*,” letter to EPA Administrator Gina McCarthy (June 26, 2014), 14.

health effects in addition to the incidence of asthma attacks discussed in the CASAC letter, including both respiratory and cardiovascular disease outcomes.

Both asthma attacks and these other adverse health outcomes often require resort to medications, and many require urgent or emergency medical care. Adults with respiratory or cardiovascular diseases suffer impacts that range from irritated eyes and chest congestion, difficulty breathing and heart attacks. Adults who require care suffer pain and impaired capacity to perform daily tasks, often miss work, lose income and incur medical costs.

When the high frequency of asthma attacks is added to the expected frequency of other adverse health outcomes, the best estimates are that ozone pollution days exceeding the NAAQS will cause from 1% to 3% of the entire exposed population to experience an adverse health outcome that interferes with personal health to the degree that normal daily activity is disrupted and some medical intervention is required. For children, the proportion adversely affected by ozone exposure is likely greater than for the entire population since children have been found to be more sensitive to pollution because of higher ventilation rates, greater air volume to body mass ratios, and higher activity levels when outdoors.

The number of days exceeding the NAAQS is therefore a useful indicator of the health burden that an exposed community will bear as a result of exposure to elevated ozone concentrations.

2. Frequent High Ozone Days Magnify the Severity of Adverse Health Effects.

To be designated nonattainment for ozone, an area needs at least four days exceeding 70 ppb, the level of the NAAQS, per ozone season for three consecutive ozone seasons. Frequent high ozone days exceeding the level of the NAAQS (70 ppb) in addition to the 12 days required to violate the ozone NAAQS, significantly magnify the adverse impact of ozone pollution on public health. In California most nonattainment areas exceeded the level of the NAAQS on many more than 12 days during recent three-year ozone reporting periods.¹⁸

Here we compare the number of exceedance days reported for each of California's ozone nonattainment areas during the 3-year reporting period (2017-19) before 2020 and the period after 2020 (2021-23). In every monitored area, the number of exceedance days has significantly declined. California's control strategies are working. California's success in integrating zero emission vehicles into its light, medium and heavy duty vehicle fleets is achieving NOx reductions that are contributing to significant improvements in the frequency of ozone exceedance days.

¹⁸ "Latest Year's (Annual) Ozone Summaries for Selected Regions (PST)", California Air Resources Board, https://www.arb.ca.gov/aqmis2/ozone_annual.php (referenced Aug. 12, 2024).

Table I.

California Ozone Nonattainment Area Total Exceedance days During the Three-year Compliance Periods Before and After the 2020 COVID Year.

	(2017-19)	(2021-23)
Sacramento	118	86
San Diego	93	82
San Joaquin Valley	329	276
South Coast ¹⁹	412	371
Ventura County	41	32
W. Mojave Valley	272	244
Coachella Valley	199	121
Mojave Valley	127	
Eastern Kern County	98	39
Imperial County	61	56
Mountain Counties –Central	25	7
Mountain Counties – Southern	74	35
Butte County	37	9
Western Nevada County	105	60

California has the most frequently polluted ozone nonattainment areas in the Nation, with the South Coast Air Quality Management District reporting over 400 days with ozone concentrations greater than the NAAQS (70 ppb), and the San Joaquin Valley reporting more than 300 exceedances of the standard during the last triennial reporting period before the COVID epidemic in 2020. Despite making progress in reducing the number of exceedance days after 2020, the evidence demonstrates that California’s ozone air quality continues to be the worst in the nation. In South Coast, 371 days exceeded the NAAQS during the most recent 3-year reporting period (2021-23), or about 125 days each year. Since ozone forms during the warm months, and exceedance days are infrequent during the winter, almost every day during the summer months is an exceedance day.

This pattern of repeated exceedance days for weeks at a time takes a heavy toll on human health. Other areas in California also experience 80 or 90 exceedance days per year. This frequency of ozone levels hazardous to health is not seen anywhere else in the US. By comparison other serious ozone nonattainment areas such as NY/NJ/CT, Houston²⁰, Dallas, Denver and Phoenix experience fewer than 20 to 30 exceedance days per year.

¹⁹ EPA reported the three-year “design value” for the Los Angeles air basin (using 2016-2018 data) as 111 ppb which is 41 ppb greater than the NAAQS (70 ppb). See <https://www3.epa.gov/airquality/greenbook/jncty.html> (referenced Nov. 18, 2019). The design value is obtained by averaging the 4th highest 8-hour concentration reported at a monitor for each of consecutive three years. Generally this suggests that on the nine days when concentrations are higher than the 4th highest value, ozone levels exceeded 111 ppb.

²⁰ Harris County, TX, reported 49 exceedance days during 2021-23. See “Increase in Houston Ozone Violations Hits Communities of Color Hardest,” Environmental Integrity Project Report (November, 2023), Table E, p. 10,

The frequency of exceedance days in multiple California nonattainment areas where more than 20 million Americans suffer the adverse health impacts of exposure to elevated ozone concentrations demonstrate that California continues to need more stringent emission standards for motor vehicles. These data establish that California needs the standards contained in the Advanced Clean Fleets regulation “to meet compelling and extraordinary circumstances.”

V. Congress Amended the Clean Air Act in 1990 to Authorize “Programs to Limit or Restrict Vehicle Use” as a Transportation Control Measure Under Title I. Such Programs are Not Pre-empted Standards to Control Emissions from New Motor Vehicles Under Title II.

Commenters submit this analysis of the text and legislative history of the Clean Air Act to support our request that EPA determine that control measures that restrict the operation of polluting vehicles, such as prohibiting the operation of polluting vehicles to provide drayage services transporting cargo to and from ports, is not a “standard relating to the control of emissions from new motor vehicles ... subject to this part,” and is therefore not pre-empted by section 209(a) of the CAA.

This analysis of the Act and its legislative history explores the interplay between provisions of the Act designed to attain national ambient air quality standards by controlling emissions from in-use vehicles to meet statutory deadlines for attainment, and provisions governing emission standards for new motor vehicles to conclude that Congress under CAA Title I authorized all States to control emissions from existing, in-use registered or licensed vehicles that contribute to NAAQS violations by limiting or restricting the operation of on-road polluting vehicles, and that Congress under Title II pre-empted States by narrowly prohibiting more restrictive emission standards for the sale or purchase of *new* motor vehicles.

Based on this analysis we ask EPA to determine that the California Drayage Truck rule is authorized in the CAA as a “transportation control measure” (TCM) under section 108(f)(1), and therefore not pre-empted by the CAA. Accordingly, we ask EPA to advise California that it may adopt this regulation as a TCM, submit it as a SIP measure, and proceed with implementation without first obtaining a federal waiver under section 209(b). EPA’s decision should inform other states that they too may adopt similar TCMs without being limited by CAA section 177 which otherwise would compel other states to wait for California to adopt a rule, EPA to grant California a waiver, and then to adopt only regulations “identical” to the California rule.

A. Title I Focuses on Near-term Control of Existing Vehicles to Attain NAAQS Within Statutory Deadlines.

With the initial enactment of the federal Air Pollution Control Act in 1963 and the subsequent enactment of the Air Quality Act in 1967, the Clean Air Act (CAA) in 1970, and CAA

available at https://environmentalintegrity.org/wp-content/uploads/2023/11/EIP_Report_HoustonOzone_Final.pdf [downloaded August 15, 2024].

Amendments in 1977 and 1990, Congress recognized that the most ubiquitous source of air pollution in America's cities, then and now, is mobile sources. Congress grappled with the problem of how to control vehicle pollution with each cycle of amendments.

From the beginning, the Act focused on two primary strategies: 1) in Title I the planning, design and management of the transportation system and the operation of vehicles to control emissions from existing (i.e., "used") vehicles; and 2) in Title II reducing emissions from new vehicles by (a) advancing vehicle technology and (b) improving fuel quality.

Title I recognized the need for different strategies from one metropolitan area to another and focused on the adoption of control measures as part of the development of State implementation plans (SIPs). Title II focused on setting national standards that govern the emission performance of new vehicles to advance control technologies and reduce emissions from future vehicles. Congress authorized or mandated control measures for States to implement under Title I, but delegated exclusive authority to EPA to set national standards for new vehicles. To protect automakers from multiple, potentially conflicting, regulatory regimes, Congress pre-empted States from setting emission standards for new vehicles, except for California because of the extraordinarily extreme pollution in California's South Coast and Central Valley regions.

We trace here the interplay between these programs to understand the context for emission control strategies based on restricting the operation of existing polluting vehicles, such as the drayage truck rule, versus emission standards for new vehicles.

1. Title I: Evolution of Statutory Strategies for Controlling Existing Vehicle Emissions.

a. Before the 1970 Clean Air Act.

Prior to 1970, the Act left air pollution targets and the control of all existing sources, both stationary and mobile, to the States. Congress focused primarily on establishing a national regulatory regime for the control of emissions from new vehicles. That regime included early versions of what became Title II including the provisions now in CAA section 209 that established federal pre-emption of State standards for new vehicles,²¹ an exemption from federal pre-emption for California,²² and preserving the authority of States "to control, regulate or restrict the use, operation or movement of registered or licensed motor vehicles."²³ The first national vehicle standards applied to the 1968 model year.

b. 1970 CAA Amendments.

In the 1970 CAA Amendments, Congress added a new broad comprehensive strategy aimed at reducing pollution in the ambient air to levels set in national ambient air quality standards

²¹ 42 U.S.C. § 7543(a).

²² *Id.*, (b).

²³ *Id.*, (d).

(NAAQS) to protect public health.²⁴ Title I of the Act set a schedule for States to adopt implementation plans (SIPs) that would control emissions from all sources, including mobile sources, to attain the NAAQS within three years after EPA approved the SIP.²⁵

In Title II Congress also enacted much more stringent statutory national emission standards for new vehicles beginning with the 1975 model year, and allowed EPA to extend the deadline through 1977 if automakers could not develop and apply the technology needed to comply.

Congress understood that to meet the new statutory deadline for attainment, very little emission reduction would be achieved initially from the new tailpipe standards for cars and trucks. The Senate Committee Report accompanying the bill explained that –

If the Nation is to continue to depend on individual use motor vehicles, such vehicles must meet high standards. The bill recognizes that a generation—or ten years’ production—of motor vehicles will be required to meet the proposed standards. During that time, as much as seventy-five percent of the traffic may have to be restricted in certain large metropolitan areas if health standards are to be achieved within the time required by this bill.²⁶

The 1970 Senate Report was clear that to initially attain air quality standards, States would need to implement limitations on the use and operation of existing vehicles in addition to federal standards for the control of emissions from new vehicles.

In addition to direct emission controls, other potential parts of an implementation plan include land use and air and surface transportation controls. These should insure that ... moving sources will be located and operated so as not to interfere with the implementation, maintenance and enforcement of any applicable air quality standard or goal.²⁷

* * * *

The Committee recognizes that during the next several years, the attainment of required ambient air quality in many of the metropolitan regions of this country will be impossible if the control of pollution from moving vehicles depends solely on emission controls. The Committee does not intend that these areas be exempt from meeting the standards. Some regions may have to establish new transportation programs and systems combined with traffic control regulations and restrictions in order to achieve ambient air quality standards for pollution agents associated with moving sources.²⁸

Congress had been advised by reports from the National Air Pollution Control Administration (NAPCA) in the Department of HEW, the predecessor to U.S. EPA’s Office of Air and Radiation,

²⁴ *Id.*, § 7409.

²⁵ *Id.*, § 7410; (added December 31, 1970, Pub.L. 91-604, § 4(a)).

²⁶ Senate Report No. 91-1196, “National Air Quality Standards Act of 1970,” at 2; reprinted in “A Legislative History of the Clean Air Act Amendments of 1970,” Volume 1 (C.R.S., January 1974), at 402 [hereinafter “Legislative History”].

²⁷ Legislative History, at 412.

²⁸ *Id.*, 413.

that emission standards for new vehicles will achieve some near-term reductions in overall fleet emissions, but “then begin to rise in response to the ever-expanding numbers of motor vehicles. Consequently, the current and proposed standards do more to keep the problem from getting worse than to solve it.”²⁹

Although the Federal standards calling for reduced pollutant emissions beginning with the 1968 vehicles constitute a substantial step forward in controlling air pollution, their impact on pollution levels will be gradual. This is because the new, controlled vehicles sold each year are only a portion of the total vehicles in use, which presently number about 90 million, and it will take time for the new vehicles to comprise a substantial portion of the total population of vehicles. The increasing dependence upon the motor vehicle as a way of life and the anticipated increases in traffic, combined with the delay in the replacement of old vehicles with new ones, will tend to offset somewhat the gains from such standards.³⁰

In 1970, when the Committee bill was being drafted, NAPCA filed another annual report with Congress reiterating that –

Though the [emission] standards already established will reverse the upward trend in total emissions of carbon monoxide and hydrocarbons from motor vehicles, this effect will be relatively short-lived. The number of motor vehicles in use in the Nation is increasing; so is the use made of each one. In another decade, these trends will more than offset the effect of the national standards established thus far.³¹

To achieve reductions from motor vehicles within the statutory schedule for attainment, the final bill reported from Conference Committee included in section 110(a)(2)(B) a requirement that a SIP include “land-use and transportation controls.” Asked during floor debate before final Senate passage what this provision required, Senator Muskie, chair of the Senate Environment subcommittee and chair of the Conference, explained:

It seems to the committee that transportation policies must be developed or improved to insure that the impact of pollution from all existing moving sources—automobiles, aircraft, trains, vessels and so on—is reduced to the minimum compatible with the needs of each region.

For example, construction of urban highways and freeways may be required to take second place to rapid transit and other public transportation systems. The use of motor vehicles may have to be restricted and, in some congested areas, the number of operations of aircraft into an airport may need to be limited, or steps taken to reduce emissions while aircraft are on the ground.

²⁹ Excerpt from “*Progress in the Prevention and Control of Air pollution*,” *First Report of the Secretary of HEW to Congress (1968)*. Legislative History, at 1418.

³⁰ *Id.*, at 1417.

³¹ Excerpt from “*Progress in the Prevention and Control of Air Pollution*,” *Third Report of the Secretary of HEW to Congress (March 1970)*. Legislative History, at 1439-40.

If such controls are required, the committee believes the plan for implementation should so provide.³²

Congress required that “transportation controls” must be included in State implementation plans, and understood that such “controls” included restrictions on the operation and use of vehicles as a control strategy.

In 1971 EPA first adopted regulations defining the content of SIPs required by the 1970 Amendments. The regulations provided a broad description of transportation controls, requiring that SIPs must include a “control strategy” that is “adequate to provide for the timely attainment and maintenance of the national standard that it implements.”³³

Control strategy means a combination of measures designated to achieve the aggregate reduction of emissions necessary for attainment and maintenance of national standards including, but not limited to, measures such as:

(7) Any **transportation control measure** including those transportation measures listed in section 108(f) of the Clean Air Act as amended.³⁴

Transportation control measure means any measure that is directed toward reducing emissions of air pollutants from transportation sources. Such measures include, but are not limited to, those listed in section 108(f) of the Clean Air Act.³⁵

In practice, however, most States failed to include transportation controls in their SIPs submitted to EPA. The Agency granted a two-year blanket extension of the statutory SIP deadline for States to submit transportation control plans.³⁶ The D.C. Circuit held that EPA lacked authority to extend the statutory deadline, reversed the deadline extension, and ordered EPA to promulgate federal transportation control plans for delinquent States.³⁷

EPA responded by promulgating federal plans for a number of cities that included parking restrictions and the infamous fuel-rationing measure for Los Angeles.³⁸ EPA also issued a nationwide indirect source program requiring the review and control of mobile source emissions from each large mobile-source dependent facility, including shopping centers, stadia, and airports in every nonattainment area.³⁹

EPA’s vehicle emission control initiatives prompted a widespread political backlash against the threat of federal control over local community development. Congress barred funding for EPA implementation of parking and fuel rationing measures. A number of States filed litigation

³² Senate Consideration of the Report of the Conference Committee. Legislative History, at 147-48.

³³ 51 C.F.R. § 112 (control strategy in an implementation plan).

³⁴ 51 C.F.R. § 100(n).

³⁵ 51 C.F.R. § 100(r).

³⁶ 37 Fed. Reg. 10,842 (1972).

³⁷ *Natural Resources Defense Council v. EPA*, 475 F.2d 968 (D.C. Cir. 1973).

³⁸ 38 Fed. Reg. 31,232 (1973).

³⁹ 38 Fed. Reg. 29,893; 29,895; codified at 40 C.F.R. 52.22

challenging the federal transportation control plans.⁴⁰ The Supreme Court granted certiorari and consolidated the cases for review, but those were ultimately dismissed as moot following enactment of the 1977 Amendments.

c. 1977 CAA Amendments.

The 1977 CAA Amendments curtailed EPA's authority to promulgate some transportation control measures in federal implementation plans. The Amendments barred Federal implementation of EPA's indirect source rule,⁴¹ and voided EPA's measures in State or Federal implementation plans that rationed motor fuels, required retrofit technologies on older vehicles, or reduced supply of on-street parking, provided the State adopted a plan revision that implemented the requirements of 110(a)(2)(I).⁴²

These provisions repealed most of EPA's initiatives to limit vehicle use. The message was clear: federal implementation was not a politically viable remedy. Strategies to control emissions from motor vehicles would have to come from the States. To give states an incentive to adopt effective programs, Congress switched to federal highway sanctions as the stick for compelling States to adopt their own transportation control strategies, and added a new "transportation conformity" provision intended to link reductions in vehicle emissions under a State's CAA SIP with transportation planning and funding under the Federal-Aid Highway Act.⁴³

Congress retained and made more explicit the obligation that States must adopt transportation control plans. For any State that failed to meet air quality standards by 1982 and sought an extension for attaining the NAAQS, section 110(a)(3)(D) required that –

[A]ny applicable implementation plan ... shall be revised to include the comprehensive measures and requirements referred to in subsection (c)(5)(B).

Subsection (c)(5)(B) required that implementation plans –

... be revised to include comprehensive measures to ...:

- (i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as practicable; and
- (ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards.

This amendment ratified and codified EPA's 1971 SIP regulations defining "transportation control measures" as "necessary for attainment or maintenance of national standards."

EPA issued SIP guidance interpreting new language in the 1977 Amendments that required SIPs for nonattainment areas to include "all reasonably available control measures"⁴⁴ for the control

⁴⁰ *District of Columbia v. Train*, 521 F.2d 971 (D.D.C. 1975); *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975). All were vacated sub nom., *EPA v. Brown*, 431 U.S. 99 (1977).

⁴¹ 42 U.S.C. § 7410(a)(5)(A)(ii).

⁴² *Id.*, § 7410(c)(4); *repealed by* 1990 CAA Amendments, Pub. L. No. 101-549, 104 Stat. 2470.

⁴³ 23 U.S.C. §§ 101 et seq.

⁴⁴ 44 Fed. Reg. 20,375 (1979).

of existing emission sources.⁴⁵ The guidance defined TCMs listed in section 108(f)(1) as “reasonably available control measures” for transportation sources. TCMs listed in § 108(f) could be omitted from a SIP if the State –

Demonstrates (a) that reasonable further progress and attainment of the NAAQS are assured, and (b) that application of all reasonably available control measures would not result in attainment any faster, then a plan with less than all reasonably available control measures may be approved.

In a citizen challenge to the Arizona SIP for the failure of the State to adopt control measures that would have accelerated attainment by two years, the Ninth Circuit Court of Appeals reversed EPA’s approval of the SIP. *Delaney v. EPA*, 898 F.2d 687 (9th Cir. 1990). The Court applied EPA’s interpretation of the Act:

An EPA guidance document explicitly provides that each of the eighteen measures listed in 42 U.S.C. § 7408 is presumed reasonably available; a state can reject one of these measures only by showing that the measure either would not advance attainment, would cause substantial widespread and long-term adverse impact, or would take too long to implement.

Delaney, 898 F.2d at 692. The Court held that EPA’s approval of the SIP without the control measures was unlawful without any showing that each measure met EPA’s criteria for determining that a measure was not reasonable.

The Act required that TCMs sufficient to provide for attainment and a plan to expand public transit were preconditions for receiving EPA approval of SIPs that sought an extension of the attainment deadline beyond 1982. If a State failed to satisfy these conditions, section 176(a) directed EPA to cut off “any grants under Title 23 [i.e., federal funding for highways under the Federal-Aid Highway Act] in any air quality control region ... (3) where the Administrator finds ... that the Governor has not submitted an implementation plan ..., or that reasonable efforts toward submitting such an implementation plan are not being made”⁴⁶

Despite the clear statutory mandate to use federal transportation funding as the incentive for States to adopt TCMs sufficient to attain the NAAQS, EPA never exercised its highway sanction authority to require States to include transportation control measures in a SIP. As a result of EPA’s repealed authority to federally promulgate many control measures, and the Reagan Administration’s decision not to deploy highway sanctions to pressure States that failed to adopt adequate control strategies, vehicle related pollution either did not improve in many areas, or deteriorated in others during the 1980s. There was no effective response to growing vehicle emissions triggered by rapid suburban sprawl and increased vehicle travel.

⁴⁵ The Amendments established a much more rigorous standard (“lowest achievable emission rate”) for major new stationary sources. *See* 42 U.S.C. § 7503.

⁴⁶ 42 U.S.C. § 7506(a); *repealed by* 1990 CAA Amendments.

When drafting the 1977 Amendments Congress also recognized that State air agencies lacked any means by which they could control the design, planning and operation of metropolitan transportation systems. Congress had vested authority to design and plan metropolitan transportation systems in a metropolitan planning organization (MPO) created through the federal transportation planning process managed by the US Department of Transportation in association with State highway agencies.⁴⁷ Federal transportation funds could only be spent on projects included in a metropolitan transportation plan adopted by an MPO. But MPOs had no obligation to adopt a plan that would achieve the emission reductions needed to attain air quality standards. State highway departments were not accountable for the air quality consequences of their plans and programs. Neither the state transportation agencies nor the MPOs were responsible for the development or implementation of transportation control measures needed to attain air quality standards. State air program administrators were caught in a Catch 22 because they were charged with adopting control strategies that included TCMs, but they lacked both the resources and the authority to implement transportation strategies that required the expenditure of public transportation funding, and/or the operation of regional transportation facilities.

In an attempt to bridge this major planning gap, Congress enacted section 176(c) which prohibited federal funding for a transportation plan or project unless it “conformed” to a SIP.⁴⁸ However, Congress did not define what conformity meant, or which agency was assigned responsibility for determining whether a transportation plan or project conformed. EPA and US DOT fought over those questions for more than a decade, issuing dueling rulemakings with conflicting interpretations of conformity. Despite the failure of MPOs to adopt plans adequate to achieve necessary emission reductions, no MPO transportation plan was disapproved for failure to conform.

By 1990 the national vehicle fleet had exploded to nearly 200 million vehicles compared to 90 million in 1970.⁴⁹ As a result of the Administration’s failure to employ highway sanctions as the primary tool Congress had enacted for inducing the States to control motor vehicle emissions, and the Administration’s failure to resolve the federal interagency conflict that obstructed implementation of the conformity amendment, ozone air quality violations worsened in cities that had been nonattainment, and the number of metropolitan areas with bad smog doubled. Ultimately Congress stepped in again in 1990 in a search for policy solutions to reverse a worsening air quality crisis caused primarily by the failure to control mobile source pollution.

d. 1990 CAA Amendments.

(i) Title I SIP Planning.

⁴⁷ 23 U.S.C. § 134.

⁴⁸ 42 U.S.C. § 7506(c).

⁴⁹ <https://www.statista.com/statistics/183505/number-of-vehicles-in-the-united-states-since-1990/>.

With support from President Bush who had campaigned in 1988 on a promise to make American cities safe places for children to breathe clean air, Congress once again took up the challenge of controlling urban smog to meet air quality standards.

To tackle the heretofore intractable problem of emissions from transportation sources as the most significant contributor to the problem, Congress enacted extensive revisions to Title I of the Act, including a new Subpart 2 focused exclusively on ozone nonattainment areas. The 1990 ozone SIP requirements provide additional statutory tools and requirements aimed at reducing aggregate emissions from motor vehicles on a metropolitan scale.

Among others, the amendments included an extensive reform of conformity aimed at establishing a quantitative motor vehicle emission budget for each metropolitan area to be achieved through the federal transportation planning process,⁵⁰ the classification of ozone nonattainment areas based on the severity of ozone violations,⁵¹ mandatory control measures for ozone nonattainment areas designated as “serious,” “severe,” and “extreme,”⁵² new mandates to implement the statutory transportation control measures in § 108(f)(1),⁵³ the addition of new TCMs to section 108(f)(1),⁵⁴ and an iterative process that imposed consequences if an area failed to attain by the statutory deadline.⁵⁵

Most relevant to the current analysis are –

(I) Congressional ratification of EPA’s 1979 guidance interpreting TCMs listed in § 108(f) as “reasonably available control measures.”

(II) the new TCM added to the 1977 list of measures enumerated in § 108(f) “regarding the formulation and emission reduction potential of transportation control measures (TCMs) related to criteria pollutants and their precursors...”:

(vii) programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use.⁵⁶

(III) additional SIP requirements that specifically address the need to control emissions from transportation sources in ozone nonattainment areas designated as “serious,” “severe,” or “extreme.”

(I) Statutory TCMs Required as “reasonably available control measures.”

The 1990 Amendments retained the language in Part D, section 172(c)(1), requiring that all SIPs for nonattainment areas “shall provide for the implementation of all reasonably available control measures as expeditiously as practicable...” In his report of the conference committee bill to the Senate, Senator Baucus, chairman of the Clean Air Act conference, explained that by retaining that text in the 1990 Amendments Congress ratified EPA’s 1979 guidance interpreting the 1977 Amendments.

⁵⁰ 42 U.S.C. § 7506(c).

⁵¹ *Id.*, § 7511(a).

⁵² *Id.*, § 7511a (a) – (j).

⁵³ *Id.*, § 7511a (c), and (d).

⁵⁴ *Id.*, § 7408(f)(1).

⁵⁵ *Id.*, §§ 7511(b)(2), 7511a (i).

⁵⁶ *Id.*, § 7408(f)(1)(A)(vii).

The sponsors believe that EPA's initial (1979) guidance for the application of the 1977 law's requirement to adopt "all reasonably available control measures" in each area was sound. The Ninth Circuit recently reviewed and correctly applied EPA's guidance. The bill (§§ 108(f), 172(c)(1)), retains the general planning approach of the 1977 law and ratifies EPA's guidance as recently construed by the Ninth Circuit in the case involving the Arizona State Implementation Plan. *Delaney v. EPA*, 898 F.2d 687 (1990).

By explicitly ratifying the interpretation of the 1977 Act adopted by the Court in *Delaney*, Congress made clear that it intended to require States with nonattainment areas to adopt as SIP control measures the TCMs enacted in section 108(f)(1) unless a State could demonstrate in accord with EPA's guidance test that each such measure was not reasonable.

(II) Congress Added "Programs to limit or restrict vehicle use" as a Statutory TCM to Provide a Regulatory Tool Needed for Attainment.

When Congress added "programs to limit or restrict vehicle use" to the list of statutory TCMs in section 108(f)(1)(A) in 1990, Congress understood and intended that –

- i) it was adding the text to Title I which governed the development of a "control strategy" to achieve the reductions in emissions from existing motor vehicles needed for attainment;
- ii) such programs would be governed by EPA's long-standing SIP regulations that define the elements of a control strategy by expressly including, *inter alia*, "[a]ny transportation control measure including those transportation measures listed in section 108(f) of the Clean Air Act as amended." 51 C.F.R. § 100(n)(7).
- iii) A SIP must include "transportation control measures" if "necessary for attainment and maintenance of national standards." 51 C.F.R. § 100(n).
- iv) Section 172 requires each SIP to include "reasonably available control measures" which had been interpreted by EPA's SIP guidance to include the enumerated measures listed in section 108(f)(1)(A) if any of them are necessary to provide for attainment.
- v) The authority for States to adopt Indirect Source Review programs was too limited in scope to reduce emissions on a regional scale.

By adding "programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration" to the list of TCMs in § 7408(f), Congress recognized that States might need to limit or restrict vehicle use across a larger portion of a metropolitan area than an individual facility as part of any control strategy to attain a transportation-related NAAQS. The 1977 Amendments had preserved the authority of States to adopt Indirect source review programs to require –

the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant⁵⁷

But such facility-by-facility review programs were not well-suited to controlling motor vehicle emissions for a downtown area or larger region. The new TCM was not limited to individual facilities. It expanded the regulatory scope by providing broad authority to limit or restrict the operation of polluting vehicles in one or more “areas of emission concentration.”

A regulation prohibiting the operation of diesel trucks to carry cargo to and from the ports is within the scope of this authority.

This statutory TCM provides broad discretion to determine the scope of where to limit or restrict vehicle use, or the types of vehicles to limit or restrict. Such limitations or restrictions on vehicle use could be limited to certain heavily trafficked highways, ports, airports, or apply to an entire nonattainment area where emission concentrations contributed by mobile sources are great enough to cause NAAQS violations, but the scope of such measures must be sufficient in the aggregate to provide for attainment.

By adding a TCM that empowers and directs states to limit or restrict vehicle access “in downtown areas or other areas of emission concentration” for the purpose of reducing emissions to attain the NAAQS, Congress necessarily granted authority for states to recognize the distinction between vehicles that emit pollution and those that do not. In fact, Congress specifically cautioned that “the State should ensure adequate access to downtown, other commercial and residential areas and should avoid measures that increase or relocate emissions and congestion rather than reduce them.”⁵⁸

These potentially competing commands to limit or restrict vehicle operations when needed to attain a NAAQS, but “ensure adequate access to downtown, other commercial and residential areas” points to control measures that allow clean vehicles to provide mobility, such as transit, rail, muscle powered and zero emission passenger vehicles, while restricting the operation of polluting vehicles. The ubiquitous availability of almost all vehicle types with zero emission drive trains now offers a measure that can satisfy both congressional objectives. The new TCM enacted in 1990 provides clear authority for limiting or restricting the use of polluting internal combustion engine powered vehicles when necessary to attain the NAAQS, while ensuring access by allowing the operation of zero emission vehicles in areas of emission concentration.

(III). Statutory Mandates to control vehicle emissions in “serious” and “severe” areas require § 108 TCMs, including “Programs to limit or restrict vehicle use.”

For “serious” areas, the Act requires that where --

aggregate vehicle emissions ... exceed the levels projected for purposes of the area’s attainment demonstration, the State shall within 18 months develop and submit a revision of the applicable implementation plan that includes a transportation control measures program consisting of measures from, but not limited to, section 7408(f) of

⁵⁷ 42 U.S.C. § 7410(a)(5)(D).

⁵⁸ 42 U.S.C. § 7511a (d)(1)(A).

this title that will reduce emissions to levels that are consistent with emission levels projected in such demonstration.⁵⁹

For “severe” areas, in addition to the requirements for “serious” areas, the Act requires -- the State shall submit a [SIP] revision that identifies and adopts specific enforceable transportation control measures to offset any growth in emissions from growth in vehicle miles travelled or numbers of vehicle trips in such area and to attain reduction in motor vehicle emissions as necessary, in combination with other emission reduction requirements of this subpart, to comply with the requirements of subsection (b)(2)(B) and (c)(2)(B) of this section (pertaining to periodic emission reduction requirements). The State shall consider measures specified in section 7408(f) of this title, and choose from among and implement such measures as necessary to demonstrate attainment with the national ambient air quality standards....⁶⁰

These provisions supplement the general obligation to adopt a plan that includes TCMs necessary for attainment in situations where the nonattainment area has more serious or severe ozone violations, or where the initially submitted plan fails to attain the NAAQS by the applicable deadline, and the area is reclassified (i.e., “bumped-up”) to a worse designation. By referencing TCMs listed in § 108(f), the statutory text expressly requires the implementation of “programs to limit or restrict vehicle use” if “necessary to demonstrate attainment with the national ambient air quality standards....”

The South Coast AQMD in California provides an example of a nonattainment area where the other measures in the attainment SIP for the 2015 ozone NAAQS are shown not to be sufficient to attain the NAAQS. The area has also not met reasonable further progress targets and attainment deadlines for older ozone NAAQS. Under these conditions, EPA’s 1979 guidance together with the 1990 statutory directives in §§ 7511a(c)(5) and (d)(1)(A) require the adoption of measures to limit or restrict vehicle use because other measures are not sufficient to provide for attainment.

Together, these amendments provide and define the scope of a State’s authority and duty to limit emissions from the use and operations of polluting vehicles, and requires states to use that authority when necessary to remedy existing violations of a NAAQS. The Drayage Truck rule applies that authority, and should be recognized by EPA as a TCM consistent with section 108(f)(1)(A)(vii).

Nothing in the amendment adding “programs to limit or restrict vehicle use” to section 108(f)(1)(A)’s list of TCMs, EPA’s SIP regulations requiring the adoption and implementation of TCMs, EPA’s SIP guidance governing “reasonably available control measures” for existing sources, or the supplemental statutory obligations for “serious” and “severe” nonattainment areas suggest that “programs to limit or restrict vehicle use,” such as CARB’s Drayage Truck rule, is a “standard relating to the control of emissions from new motor vehicles” pre-empted

⁵⁹ 42 U.S.C. §7511a (c)(5).

⁶⁰ 42 U.S.C. § 7511a(d)(1)(A).

under section 209. The Drayage Truck rule applies to the in-use operation of registered or licensed vehicles aimed at controlling aggregate emissions on a regional scale as required by these provisions of the 1990 Amendments.

As a SIP TCM, adopted by a State to implement a NAAQS, the Drayage Truck rule must be enforceable.⁶¹ Section 116 also confirms that the Act does not pre-empt a State from enforcing “any requirement respecting control or abatement of air pollution ...” unless expressly pre-empted under section 209.⁶² Next we analyze why section 209(a) does not pre-empt programs that limit or restrict vehicle use such as CARB’s Drayage Truck rule.

2. Title II: Section 209 Affirms, Rather than Pre-empts, TCM “programs to limit or restrict vehicle use.”

In addition to controlling emissions through State air quality implementation plans under Title I, Title II of the Act establishes a program for limiting emissions from new motor vehicles sold in the U.S. Section 202 requires the U.S. EPA to set --

... standards applicable to the emission of any air pollutant from any class or classes of **new** motor vehicles or **new** motor vehicle engines ... which ... cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.⁶³

The Act defines “new motor vehicle” to mean “a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser....”⁶⁴

After a fleet operator or owner-driver acquires title and registers or licenses a truck or van for operation on the public highways, under the CAA that vehicle is no longer a *new* motor vehicle. Limitations or restrictions on its operation or use are not “standards relating to the control of emissions from a *new* motor vehicle.” Regulations restricting the operation of polluting vehicles, such as the Drayage Truck rule, are not pre-empted under section 209(a).

a. Pre-emption Intended to Prevent Multiple Regulatory Regimes for New Vehicles.

EPA emission standards apply nationally to all new vehicles sold. To protect public health in the more extreme pollution conditions that prevail in California, section 209(b) of the Act authorizes California to adopt “emission standards” for new motor vehicles that are more stringent than EPA standards, but only if California “needs such State standards to meet compelling and extraordinary conditions.”⁶⁵

In recognition that other states also might need vehicles cleaner than required by EPA’s standards to attain the NAAQS, § 177 authorizes other states to adopt “identical” standards as

⁶¹ See 40 C.F.R. § 51.281 (requiring enforceable rules for control measures).

⁶² “Except as otherwise provided in sections ... 7543 ... of this Title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution” 42 U.S.C. § 7416.

⁶³ 42 USC § 7521(a)(1) [emphasis added].

⁶⁴ 42 U.S.C. § 7550 (3).

⁶⁵ 42 USC §7543(b).

California's for new vehicles sold in the State, but only if EPA has granted California the waiver from pre-emption authorized by §209(b).⁶⁶

In § 209, Congress pre-empted the States from requiring manufacturers to meet a multiplicity of standards. Subsection 209(a) of the Act pre-empts States from –

... adopt[ing] or attempt[ing] 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.⁶⁷

Section 177 repeats this focus on new motor vehicles, by allowing other states to adopt only the California standards for new vehicles, and barring states from prohibiting the sale of vehicles certified in California “or otherwise create such a ‘third vehicle’.”⁶⁸

Clearly the congressional intent for pre-emption in section 209 is to prevent States from creating multiple regulatory regimes that disrupt or add costs to the design, manufacture and sale of new motor vehicles.

b. Pre-emption Does Not Apply to Programs Limiting or Restricting Vehicle Use as a TCM.

In juxtaposition against these expressly pre-empted areas of State action, Congress in subsection 209(d) made clear that a State is not pre-empted from regulating or restricting the use or operation of vehicles after they have been registered or licensed for operation on the public highways.

Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate or restrict the use, operation or movement of registered or licensed motor vehicles.⁶⁹

Together, these provisions define the scope of regulatory actions that States are barred from taking to control emissions from motor vehicles before they are sold to the ultimate purchaser, and that they are allowed to take to restrict the use and operation of vehicles after they are registered or licensed for use. The Senate Committee explained in its report of the Clean Air Amendments of 1970 that:

This section would create a federal preemption in order to prevent a multiplicity of State standards for emission control systems on new motor vehicles as required by section 202, or the regulation of fuels as provided in section 212. This preemption would extend to all new vehicles, commercial vehicles, airplanes and vessels.

* * *

⁶⁶ *Id.*, § 7507.

⁶⁷ 42 U.S.C. § 7543(a) [emphasis added].

⁶⁸ *Id.*, § 7507.

⁶⁹ *Id.*, § 7543(d).

Nothing in this section would infringe the ability of a State or community to regulate the use of any vehicle once it has been purchased.⁷⁰

Congress carefully limited federal pre-emption to the regulation of emissions from new vehicles before they are licensed or registered for use by the ultimate purchaser. In sections 209(d) and 116 Congress explicitly recognized that States and their political subdivisions have inherent authority to limit or restrict the operation of vehicles once they are in use. This provision was added to § 209 to make clear that the pre-emption of State authority to adopt “standards” for “any new motor vehicle or new motor vehicle engine” in § 209(a) does not extend to State authority to limit or restrict the “use, operation or movement” of vehicles after they have been registered or licensed. In section 209 Congress drew a sharp line between what is pre-empted and what is not. States may not set “standards” that limit emissions from **new** vehicles, but once a vehicle has been licensed or registered for use on the public highways, its operation and use may be regulated by a State or local jurisdiction for the purpose of controlling emissions to attain one or more NAAQS.

The Supreme Court interpreted the scope of section 209(a) pre-emption in *Engine Manufacturers Assn. v. South Coast AQMD*, 541 U.S. 246 (2004). California argued that the Act only pre-empted standards that applied to the sale of new vehicles by manufacturers, but the Court determined that pre-emption also extends to local regulations that set standards for the purchase of new vehicles by fleet operators. Whether they apply to vehicles sold by manufacturers or purchased by fleet operators, regulations establishing emission standards for new vehicles are pre-empted. But regulations at issue in that decision did not limit or restrict the operation of vehicles after they had been sold to, purchased by, and licensed by the final owner.

In its decision, the Court reiterated the traditional rule of statutory construction that “Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U. S. 189, 194 (1985). In section 209, the statutory text is clear: pre-emption under section 209(a) expressly prohibits State standards for **new** vehicles, and under 209(d) pre-emption does not extend to the operation of vehicles once they have been licensed or registered.

The statutory text of section 209 must be interpreted to give effect to the purpose Congress intended to achieve when it added “programs to limit or restrict vehicle use” to the list of TCMs in § 7408(f). Section 209(d) expressly preserved State authority to adopt and implement the programs Congress required when it added a TCM that empowers states to limit or restrict vehicle access as a SIP strategy for the purpose of reducing emissions to attain the NAAQS.

Thus when Congress added this new “transportation control measure” to § 108(f)(1)(A) in 1990, Congress specifically recognized that some States might have no other option, or might find it more cost-effective to limit or restrict the operation of vehicles to implement a NAAQS.

⁷⁰ Senate Report # 91-1196, Committee on Public Works (Sept. 17, 1970), at 32.

If the other measures in a SIP are shown when implemented not to be sufficient to attain the NAAQS, or a State cannot demonstrate when submitting a revised SIP that the adopted measures in its control strategy will be sufficient to attain the NAAQS, then EPA's 1979 guidance interpreting "reasonably available control measures" together with the 1990 statutory directives in §§ 7511a(c)(5) and (d)(1)(A) require the adoption of measures that limit or restrict vehicle use.

This statutory TCM provides broad discretion to determine the scope of such limitations, but the guiding principle is that such limitations on vehicle use must be sufficient to provide for attainment when other control measures along with vehicle emission standards are not sufficient to attain. The scope of measures restricting vehicle use could be limited to certain heavily trafficked highways, ports, airports, or apply to an entire nonattainment area where emission concentrations contributed by mobile sources are great enough to cause or contribute to NAAQS violations, but the scope of such measures must be sufficient to provide for attainment.

Restricting or limiting the operation of vehicles is a strategy that Congress recognized in the legislative history of the 1970 Amendments as necessary for States to implement the statutory deadlines enacted in 1970 for attainment of the newly created NAAQS.

The Committee recognizes that during the next several years, the attainment of required ambient air quality in many of the metropolitan regions of this country will be impossible if the control of pollution from moving vehicles depends solely on emission controls. *** Some regions may have to establish new transportation programs and systems combined with traffic control regulations and restrictions in order to achieve ambient air quality standards for pollution agents associated with moving sources.⁷¹

Congress understood that the air quality benefits of federal emission standards for new vehicles would take many more years to be achieved than the statutory deadlines allowed for attainment. The legislative history includes evidence showing that Congress understood that new vehicle standards would not likely result in attainment for transportation-related pollutants before 1990. The 1970 Senate Report explicitly explains the scope of "transportation controls" needed to attain the NAAQS within the statutory deadlines, *supra* at 13-14.

The statutory language added in 1990 to § 108(f) explicitly authorizing States to adopt TCMs that "limit or restrict vehicle use [in] areas of emission concentration" provides statutory text to implement the congressional intent discussed only in legislative history in 1970. The text of the 1990 amendment closely tracks the discussion in the 1970 legislative history explaining that States might be required to restrict vehicle use to control emissions from existing vehicles while waiting decades for emissions to be reduced by replacing old dirty vehicles with cleaner new vehicles.

The use of the term "restrict" in the 1970 Senate Report, the preservation of State authority in § 209(d), and use of the term "restrict" in the TCM enacted in 1990, strongly infers that Congress did not intend that § 209(a) pre-empts state authority to limit or restrict the use,

⁷¹ Senate Report, at 13; Legislative History, at 413.

operation or movement of vehicles as a TCM. On the contrary, subsection 209(d) makes clear that a state has the authority to restrict the operation of a vehicle once it is licensed or registered for use regardless of its initial status as a new vehicle federally certified as compliant with emission standards.

The fact that Congress declared programs to limit or restrict use of vehicles to be a TCM under section 108(f) also makes clear that such programs are not to be interpreted as a “standard” subject to pre-emption under section 209(a). Emission standards issued under § 202 that govern the manufacture, certification and sale of *new* vehicles, are not to be confused with a TCM enumerated in §108(f) under Title I which governs the development of SIPs and defines the strategies available to states for the purpose of controlling aggregate emissions from in-use vehicles to Implement a NAAQS. Clearly Congress did not intend to pre-empt in section 209 TCMs that it requires to be implemented under Title I.

VI. Supreme Court Application of “Major Questions” Doctrine Requires That Drayage Rule Be Recognized as a TCM.

The U.S. Supreme Court has recently applied the “major Questions” doctrine when reviewing U.S. EPA rulemakings that transform the national economy with major economic consequences for large industrial enterprises. Under the major questions doctrine, “an agency must point to clear congressional authorization when it seeks to regulate ‘a significant portion of the American economy,...’” *West Virginia v. EPA*, 597 U.S. 697, citing *Utility Air Regulatory Group v. EPA*, 573 U.S. 302. “The Government must—under the major questions doctrine—point to ‘clear congressional authorization’ to regulate in that manner.” *UARG*, 573 U. S., at 324.

California’s regulation restricting access to the ports only by zero emission vehicles is likely to be treated as a regulatory initiative that seeks to transform the national HDV fleet from dependence on petroleum fuels as its motive source to electricity or other non-polluting sources of energy. A policy aimed at that objective will inevitably be treated as governed by the Major Questions doctrine.

The primary thrust of the major questions doctrine, as applied in *West Virginia*, is the conclusion that when Congress has not been clear about how a statute is to be applied in contexts that have major impacts on the economy, there is no delegation of authority to the agency to fill in the gap by offering an agency rationale that provides the missing clarity. In other words, ambiguity does not give rise to statutory interpretations by either agencies or courts that empower agencies to transform the national economy. The absence of clear statutory authority bars any agency action until Congress resolves the ambiguity.

Given the Court’s insistence that major policies be based on clear congressional authorization, the Drayage rule must rely for its authority on the explicit language Congress added to § 108(f)(1)(A) in 1990 declaring that “programs to limit or restrict vehicle use in ... areas of emission concentration” are “reasonably available” “transportation control measures.” Section 209(d) in Title II preserves “the right” of States and political subdivisions to restrict the use or operation of vehicles, but does not define “programs to limit or restrict vehicle use” as TCMs

which are mandated by the Act when needed to timely attain the NAAQS. Only § 108(f)(1)(A) provides the clear statutory authority that the Court demands to support agency actions designed to transform the national economy.

CONCLUSION.

To ensure that California and other states have the power to adopt programs aimed at transforming motor vehicle fleets from polluting internal combustion technologies to zero emission technologies as needed to attain national ambient air quality standards, EPA must recognize that CARB's Drayage Truck regulation is a TCM authorized under § 108(f)(1)(A) of the Act, and not a "standard" relating to the control of emissions from a new motor vehicle. No waiver of federal pre-emption is required under § 209(b) as a precondition for California to proceed with implementation of the Drayage Truck regulation.

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