

August 2, 2022

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U.S. Environmental Protection Agency
Docket ID No. EPA-HQ-OAR-2022-0332
Docket ID No. EPA-HQ-OAR-2022-0331
Docket ID No. EPA-HQ-OAR-2022-0330

To Whom It May Concern:

The National Association of Clean Air Agencies (NACAA) is pleased to respond to EPA's requests for comments (87 Fed. Reg. 35,765, 35,768 and 35,760) on three requests by the California Air Resources Board (CARB) for EPA to grant waivers of preemption, or to confirm that certain regulatory amendments fall within the scope of a waiver of preemption previously granted to California, under Section 209(b) of the Clean Air Act (CAA).^{1,2,3} NACAA is the national, nonpartisan, nonprofit association of air pollution control agencies in 40 states, including 117 local air agencies, the District of Columbia and five territories. The air quality professionals in our member agencies have vast experience dedicated to advancing the equitable protection of clean air and public health in the U.S. These comments are based upon that experience. The views expressed in these comments do not represent the positions of every state and local air pollution control agency in the country.

California's three requests, all related to the regulation of heavy-duty vehicles and engines, include the following:

- 1) Request for Waiver and Authorization Action Pursuant to Clean Air Act Section 209(b) for California's "Omnibus" Low NO_x Regulation (January 31, 2022) (Docket No. EPA-HQ-OAR-2022-0332);
- 2) Request for Waiver Action Pursuant to Clean Air Act Section 209(b) for California's Advanced Clean Trucks, Zero Emission Airport Shuttle and Zero-Emission Powertrain Certification Regulations (December 20, 2021) (Docket No. EPA-HQ-OAR-2022-0331); and
- 3) Request for Waiver Action Pursuant to Clean Air Act Section 209(b) for 2018 Amendments to the California Emissions Warranty and Maintenance Provisions for 2022 and Subsequent Model Year On-Road Heavy-Duty Diesel Engines and Heavy-Duty Diesel Vehicles With Gross Vehicle Weight Ratings (GVWRs) Exceeding 14,000 Pounds (October 22, 2021) (Docket No. EPA-HQ-OAR-2022-0330);

Below we provide details but, in brief, we urge EPA to fulfill its statutory obligations and fully and promptly approve all three waiver requests currently before the agency.

¹ <https://www.govinfo.gov/content/pkg/FR-2022-06-13/pdf/2022-12719.pdf>

² <https://www.govinfo.gov/content/pkg/FR-2022-06-13/pdf/2022-12717.pdf>

³ <https://www.govinfo.gov/content/pkg/FR-2022-06-13/pdf/2022-12718.pdf>

State and Local Authorities to Take Actions on Their Own Are a Pillar of the Clean Air Act

NACAA has a decades-long unwavering history of strongly supporting full and prompt approval by EPA of CARB's waiver requests and continues to make protecting the Clean Air Act authorities vested by Congress in state and local air agencies to take actions on their own a top priority. As we highlight in NACAA's January 15, 2021, white paper, *Improving Our Nation's Clean Air Program: Recommendations from the National Association of Clean Air Agencies to President-Elect Biden's and Vice President-Elect Harris' Administration*, "The authority vested in state and local agencies to take actions on their own – that are at least as rigorous as, or go beyond, federal requirements – is a pillar, not a quirk, of the Clean Air Act. The Administration should support states and localities that take such actions on clean air and climate change in order to achieve and sustain their clean air and climate goals. When state and local air agencies are allowed to be laboratories of innovation and implement programs that best meet their needs and circumstances, everyone benefits."⁴

States' Regulation of Mobile Sources

In the Clean Air Act, Congress determined that the reduction of air pollution – including that which may have an effect on climate and weather – is the primary responsibility of states and local governments. Although the Act establishes a federal program to set minimum vehicle emission requirements to serve as a "floor" for state regulation, it specifically authorizes California to establish a more stringent state motor vehicle emissions control program under certain conditions. While consideration of the potential adverse impact on commerce of many different state vehicle emission standards led Congress to preempt states other than California from adopting motor vehicle emission standards, Congress does, in Section 177 of the Act, provide that each state is free to choose whether to enforce the federal emission standards or California's at-least-as-protective-in-the-aggregate standards for new motor vehicles sold in-state. The federal government has no permissible role in this decision.

California's Leadership Role Under the Clean Air Act

California has traditionally led the national effort to reduce air pollution. Congress has consistently recognized and supported California's leadership role in its design of the federal Clean Air Act. As we also highlight in our January 15, 2021, recommendations to the Biden-Harris Administration, "In 1967, Congress protected states' rights by specifically preserving California's authority to regulate emissions from motor vehicles under the waiver provision of Section 209 of the Clean Air Act. It extended these rights in 1977 by allowing other states to adopt California's motor vehicle emission standards under Section 177" if they so desire.⁵

California's Current Waiver Requests

The three requests for waiver action currently before EPA cover the following rules, all of which seek to reduce emissions from heavy-duty vehicles.

California's "Omnibus" Low NO_x Regulation (Omnibus) sets the next generation of NO_x emission standards and related requirements (including for, among others, in-use performance, useful life and warranty *periods, test procedures and enforcement) for new heavy-duty trucks beginning with model year (MY) 2024.

⁴ <https://www.4cleanair.org/wp-content/uploads/NACAA2021PresidentialTransitionDocument-01152021.pdf>

⁵ *Id.*

A second waiver action package from California relates to three regulations. California's Advanced Clean Trucks (ACT) Regulation requires manufacturers to produce and deliver for sale in California increasing numbers of onroad heavy-duty vehicles that emit zero emissions beginning with MY 2024. The powertrains used to propel these zero-emission vehicles are required to comply with California's Zero-Emission Powertrain (ZEP) Certification Regulation beginning with MY 2024. The ZEP Certification Regulation establishes optimal emission standards and certification requirements for MY 2021 and later heavy-duty (HD) battery electric and HD fuel cell vehicles and the ZEPs installed in these vehicles. The Zero Emission Airport Shuttle (ZEAS) Regulation requires fleet owners that service the 13 largest airports in California to acquire increasing numbers of ZEAS such that by December 31, 2035, 100 percent of all affected fleets must be ZEAS.

In its third waiver action package, California asks EPA to confirm the state's determination that its 2018 amendments to California's emissions warranty and emissions maintenance schedules for new 2022 and later MY California onroad HD diesel engines and vehicles with gross vehicle weight ratings over 14,000 pounds fall within the scope of the waiver of preemption EPA previously granted for California's emission standards and related test procedures for 2007 and later MY HD diesel vehicles and engines. These 2018 amendments lengthen emission warranty periods, update minimum allowable maintenance intervals, explicitly link the HD on-board diagnostic system to the definition of a warranted part, require manufacturers to be liable for the repair or replacement of turbochargers and exhaust gas recirculation systems throughout the useful life of the engine, revise existing regulatory language that unintentionally truncates warranty periods and make other clarifications.

EPA's Role in Responding to Waiver Requests

As established by Congress, EPA's role in granting a waiver to California on a particular motor vehicle emissions rule is narrow and deferential. EPA is not to substitute its judgment for that of CARB as to whether a standard is too technically challenging or too expensive. Moreover, EPA may not base its decision on statutes other than the Clean Air Act, or other policy considerations. Rather, EPA *must* grant California's request for a waiver unless it can demonstrate that one or more of the conditions of Section 209(b) of the Act are not met.

EPA must grant the waiver unless it can be shown by clear and convincing evidence that CARB acted in an arbitrary and capricious manner when it determined that the regulation for which it seeks a waiver did not render the state's mobile source program, considered as a whole, less protective than the federal program.

EPA must grant the waiver unless it determines that California no longer needs to maintain an independent motor vehicle emissions program. Under prior precedent, the issue is not whether California needs a particular standard or whether any particular standard will significantly contribute to resolving an identified problem unique to California but, rather, that there are compelling and extraordinary conditions warranting a continuing California vehicle emissions program.

Finally, EPA must grant the waiver unless it determines that California's motor vehicle program is not consistent with the requirements of Clean Air Act Section 202(a).

The Urgent Need for Emission Reductions from Heavy-Duty Trucks and Engines in California and Nationwide

In August 24, 2020 written comments to CARB,⁶ NACAA supported the state's proposed Omnibus to reduce NO_x emissions from heavy-duty trucks, which was adopted on August 27, 2020, and ultimately finalized in December 2021, after an extensive public process that was preceded by several years of informal stakeholder input. The research supporting CARB's Omnibus – including research jointly funded by EPA and CARB and conducted by the Southwest Research Institute – is rigorous and the data and findings solidly supportive of the Omnibus standards.

NACAA recognizes the urgent need for the Omnibus in California, beginning not later than MY 2024, as well as the clear and profound need for significant NO_x emission reductions from HD trucks and engines nationwide, beginning not later than MY 2027.

Five states have already individually exercised their right of self-determination under Section 177 of the Clean Air Act and joined California with adoption of heavy-duty new vehicle policies.^{7,8,9,10,11} A sixth state has passed enabling legislation¹² and others are considering similar bills or have taken public process steps related to regulatory development. These states have chosen to take these actions because they need the emission reductions offered by the Omnibus to best protect the health of their residents.

In fact, more than one third of the U.S. population lives in areas of the country designated nonattainment for the health-based National Ambient Air Quality Standards (NAAQS) for ozone, particulate matter (PM) or both, and many others live in areas just on the cusp of nonattainment. Many of these areas are over-burdened communities whose citizens are exposed to a disproportionate share of harmful environmental conditions. The excessive emissions from HD trucks are a primary cause, contributing substantial emissions of NO_x – the key pollutant contributing to the formation of ozone and PM_{2.5} – and are linked with a large number of adverse impacts to the respiratory system, as well as other ill effects associated with exposure to elevated levels of ozone and PM, including premature death.

In the absence of far more stringent federal HD truck NO_x standards beginning with MY 2027, these areas will find themselves unable to address emissions from one of their largest sources, likely delaying their attainment, or driving them into nonattainment. Areas that miss their attainment deadlines face the threat of “bump up” to a more demanding classification of nonattainment – if they are not already classified as Extreme – and statutorily required economic sanctions if they fail to meet their attainment deadlines. On April 13, 2022, EPA proposed to bump up 30 areas in nonattainment of the 2008¹³ and 2015¹⁴ NAAQS for ozone, meaning the citizens of these areas continue to suffer the detrimental impacts of unhealthy air. Additionally, EPA is now in the process of reconsidering the existing PM and ozone NAAQS, adopted in 2012 and 2015, respectively, and reaffirmed in December 2020 – initiatives that could well conclude with the Administrator

⁶ https://www.4cleanair.org/wp-content/uploads/Documents/NACAA_Comments-CARB_HD_NOx_Omnibus_Proposal-082420.pdf

⁷ <https://www.mass.gov/guides/massachusetts-low-emission-vehicle-lev-program>

⁸ https://www.nj.gov/dep/rules/adoptions/adopt_20211220a.pdf

⁹ <https://www.dec.ny.gov/regulations/26402.html>

¹⁰ <https://www.oregon.gov/deq/rulemaking/Pages/ctr2021.aspx>

¹¹ <https://ecology.wa.gov/Air-Climate/Climate-change/Reducing-greenhouse-gases/ZEV> and <https://ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC173-423-400Jan18>

¹² <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2022/04-2022/Governor-Lamont-Applauds-Final-Passage-of-Climate-Legislation-That-Includes-New-Emissions-Standards>

¹³ <https://www.govinfo.gov/content/pkg/FR-2022-04-13/pdf/2022-07509.pdf>

¹⁴ <https://www.govinfo.gov/content/pkg/FR-2022-04-13/pdf/2022-07513.pdf>

revising the standards for one or both pollutants to be more protective of public health, thus requiring many areas across the country to reduce, or further reduce, emissions that contribute to levels of pollution that exceed the new standard(s).

As such, NACAA strongly supports adoption by EPA of a final federal rule, by not later than the end of this calendar year, establishing NO_x emission standards and other program components as described in our May 16, 2022, comments to EPA on the agency's March 28, 2022, proposed HD truck rule.¹⁵

In addition to adopting such a federal rule, we cannot overstate the need for EPA to grant the waiver requested by California for the Omnibus without delay, so that it can take effect on schedule for California and for the states that have availed themselves of their Section 177 authority to adopt the CARB rule and so that the Omnibus is available for other states to adopt should the final federal rule be delayed; fall short on the rigor of the emission standards or related program components; or, as a whole, fail to achieve the necessary emission reductions.

Like the Omnibus, the other rules for which California seeks waiver actions will also yield, or ensure, NO_x and PM emission reductions that are substantial and urgently needed – by California and many other areas of the nation. For example, zero-emission trucks required to be manufactured and sold under the Advanced Clean Trucks program will not only function to support regional air quality, they will also benefit disproportionately burdened communities via critical reductions in localized exposure to tailpipe pollution and, furthermore, will help to address the growing threat of climate change. For the same reasons as the Omnibus, it is critical that EPA grant these waiver requests.

Conclusion

In conclusion, the Omnibus, Advanced Clean Trucks, ZEAS and ZEP Powertrain Certification Regulations meet all of the statutory criteria that EPA must, and the only criteria that EPA may, consider when responding to a request by California for a waiver. It is incumbent on EPA to take swift action to fully approve these waivers. In addition, California has requested that EPA confirm that the state's 2018 amendments to its emissions warranty and maintenance schedules fall within the scope of a previously granted waiver. California has demonstrated that these amendments meet the requirements for such a confirmation; the amendments also meet the statutory criteria for a new waiver of preemption. Therefore, EPA should also take swift and complete action to affirmatively respond to this request for waiver action.

Thank you for this opportunity to comment. If you have questions, please contact either of us or Nancy Kruger, Deputy Director of NACAA.

Sincerely,



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¹⁵ https://www.4cleanair.org/wp-content/uploads/NACAA_Comments-EPA_HD_Truck_NPRM-051622lh.pdf