

August 2, 2022

Michael S. Regan, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Re: California's requests for waivers of preemption for its Advanced Clean Trucks, Zero-Emission Airport Shuttle, and Zero-Emission Power Train Certification regulations, Docket No. EPA-HQ-OAR-2022-0331, Omnibus Low-NO_x regulation, Docket No. EPA-HQ-OAR-2022-0332, and Heavy-Duty Vehicle and Engine Emissions Warranty and Maintenance regulations, Docket No. EPA-HQ-OAR-2022-0330

Dear Administrator Regan:

The Northeast States for Coordinated Air Use Management (NESCAUM) submits the following comments in response to each of the three notices of opportunity for public hearing and comment issued by the U.S. Environmental Protection Agency (EPA) in the above-referenced dockets and published in the Federal Register on June 13, 2022.

NESCAUM is the regional association of state air quality agencies in Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. NESCAUM serves as a technical and policy advisor to its member agencies on a wide range of air pollution and climate issues and facilitates multi-state initiatives to improve air quality and mitigate climate change. For more than three decades, NESCAUM and its members have closely collaborated with California and other states, EPA, and the automobile industry to promote low-emission and zero-emission vehicles (ZEVs).

In these proceedings, EPA is considering the State of California's requests for waivers of preemption under Section 209(b) of the Clean Air Act (CAA) for the state's Advanced Clean Trucks (ACT), Zero-Emission Airport Shuttle (ZEAS), and Zero-Emission Power Train (ZEP) Certification regulations, 87 Fed. Reg. 35768-71, Omnibus Low-NO_x regulation, 87 Fed. Reg. 35765-68, and Heavy-Duty Vehicle and Engine Emissions Warranty and Maintenance regulations, 87 Fed. Reg. 35760-63. As discussed below, NESCAUM strongly supports California's requests and urges EPA to promptly grant each in its entirety.

I. Introduction

Earth's climate is changing faster than it has at any point in the history of modern civilization, driven primarily by greenhouse gas (GHG) emissions from human activities. The impacts—including more frequent and intense precipitation and wind events, flooding, heat waves, drought, wildfires, retreating snow and ice pack, ocean warming and acidification, accelerating

sea level rise, and large-scale biodiversity loss—are being felt by communities across the globe and will worsen in coming years.¹

Transportation is the largest source of GHG emissions in the United States. While medium- and heavy-duty (MHD) vehicles comprise only 5 percent of the total number of on-road vehicles in the United States today, their annual mileage per vehicle is significantly greater than that of passenger vehicles.² MHD vehicles account for 30 percent of GHG emissions from on-road transportation,³ 42 percent of emissions of smog-forming nitrogen oxides (NO_x), and 51 percent of fine particulate matter (PM_{2.5}) emissions from on-road vehicles in the United States and are a significant source of emissions of hazardous air pollutants.⁴

Exposure to diesel exhaust from MHD vehicles can worsen asthma, trigger heart attacks and strokes, and lead to cognitive challenges, and contributes to thousands of premature deaths each year. For decades, low-income communities and communities of color located near freight hubs, bus depots, trucking corridors, and other emissions sources have been directly and disproportionately affected by the cumulative impacts of air pollution from MHD vehicles and other emissions sources. With freight volumes expected to continue to increase over the next decade, pollution from MHD vehicles will present an increasingly greater public health risk to communities located near heavy truck traffic. Many of these communities are also more vulnerable to climate change impacts, such as more frequent and intense flooding and extreme heat.⁵

II. State Medium- and Heavy-Duty Vehicle Electrification Goals

Rapid, equitable, widespread electrification of MHD vehicles is needed to avoid the worst effects of climate change and improve air quality and health outcomes, especially in communities overburdened by air pollution. Recognizing the urgent need for action, a diverse coalition of 17 states, the District of Columbia, and the Canadian province of Quebec has committed, through the Multi-State Medium- and Heavy-Duty Zero Emission Vehicle Memorandum of

¹ See, e.g., Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022: Mitigation of Climate Change*, Contribution of Working Group III to the Sixth Assessment Report of the IPCC (AR6) (April 2022), <https://www.ipcc.ch/report/ar6/wg3/>; IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, Contribution of Working Group II to the AR6 (February 2022), <https://www.ipcc.ch/report/ar6/wg2/>; IPCC, *Climate Change 2021: The Physical Science Basis*, Contribution of Working Group I to the AR6 (August 2021), <https://www.ipcc.ch/report/ar6/wg1/>; see also IPCC, AR6 Synthesis Report (forthcoming 2022), <https://www.ipcc.ch/ar6-syr/> (visited June 23, 2022).

² See U.S. Federal Highway Administration, Annual Vehicle Distance Traveled in Miles and Related Data - 2019 (1) by Highway Category and Vehicle Type (revised October 2021), <https://www.fhwa.dot.gov/policyinformation/statistics/2019/pdf/vm1.pdf>.

³ U.S. Environmental Protection Agency, U.S. Greenhouse Gas Emissions and Sinks 1990-2019 (April 2021), <https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2019>.

⁴ J. O'Day, *Ready for Work: Now Is the Time for Heavy-Duty Electric Vehicles*, Union of Concerned Scientists (December 11, 2019), <https://www.ucsusa.org/resources/ready-work>.

⁵ U.S. Environmental Protection Agency, *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts* (September 2021), <https://www.epa.gov/cira/social-vulnerability-report>.

Understanding (MOU),⁶ to work to substantially reduce GHG emissions and air pollution from MHD vehicles by accelerating the market for MHD ZEVs. In the United States, these jurisdictions collectively represent 43 percent of the population, 50 percent of the economy, and 35 percent of the nation's Class 2b-8 MHD vehicles.⁷ To achieve a timely transition and ensure near-term progress, these jurisdictions have committed to strive to make at least 30 percent of sales of new MHD vehicles ZEVs by 2030, and 100 percent of sales ZEVs by no later than 2050. Some of the participating jurisdictions have established sales targets more ambitious than the MOU. Seven of the NESCAUM states are participants.

In July 2022, after a two-year development process, including extensive engagement with a broad range of partners and stakeholders, the jurisdictions released a *Multi-State Medium- and Heavy-Duty Zero-Emission Vehicle Action Plan* to recommend policy options to foster a self-sustaining market for zero-emission MHD vehicles.⁸ The plan includes more than 65 recommendations for state policymakers, including vehicle sales and purchase requirements, vehicle and infrastructure incentives, actions for electric utilities and utility regulators, innovative financing mechanisms, outreach and education, economic equity and workforce development, community air monitoring, infrastructure planning and deployment, and areas for ongoing research and policy evaluation. Many of the participating jurisdictions are already implementing or are working to implement the plan's recommendations.⁹

As discussed in the *Action Plan*, “[r]egulatory programs requiring manufacturers to sell increasing percentages of zero-emission trucks and buses, such as California’s [ACT] regulation, are one of the most effective tools available to rapidly advance the market for MHD ZEVs.”¹⁰ Vehicle sales and purchase requirements provide the market certainty needed to drive investments in zero-emission technologies and charging and fueling infrastructure. Indeed, the ZEV sales mandate for passenger vehicles, adopted in California and other states, has prompted unprecedented investment in light-duty ZEV technologies and substantial growth in the light-duty ZEV market. ACT and similar regulations may be an even more important driver of electrification of the MHD vehicle sector given the costs and characteristics of trucks and buses.¹¹ For these reasons, the first recommendation in the *Action Plan* provides that:

⁶ Multi-State Medium- and Heavy-Duty Zero-Emission Vehicle Memorandum of Understanding (July 2020), <https://www.nescaum.org/documents/mhdv-zev-mou-20220329.pdf/>. The jurisdictions participating in the initiative include California, Colorado, Connecticut, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Quebec.

⁷ Census Bureau, 2020 Population and Housing State Data (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/2020-population-and-housing-state-data.html>; Bureau of Economic Analysis, GDP and Personal Income, <https://apps.bea.gov/itable/iTable.cfm?ReqID=70&step=1#reqid=70&step=1&isuri=1> (visited July 18, 2022) (2020 Real GDP); Atlas Public Policy, EV Hub, <https://www.atlasevhub.com/materials/medium-and-heavy-duty-vehicle-registrations-dashboard/#06f2a5dfc39daf9cc> (visited June 23, 2022) (2021 IHS market data).

⁸ See Multi-State ZEV Task Force, *Multi-State Medium- and Heavy-Duty Zero-Emission Vehicle Action Plan: A Policy Framework to Eliminate Harmful Truck and Bus Emissions* (July 27, 2022), <https://www.nescaum.org/documents/multi-state-medium-and-heavy-duty-zev-action-plan.pdf>. NESCAUM facilitated the *Action Plan* development process.

⁹ See generally, *id.*

¹⁰ *Id.* at 29.

¹¹ *Id.* at 30-31.

1. States should consider adopting:
 - a. The ACT regulation to establish zero-emission sales requirements for trucks, along with a one-time fleet reporting requirement, adjusted as needed based on the size of the state, to collect data on fleet operations;
 - b. Corresponding fleet purchase requirements, such as the Advanced Clean Fleets regulation and the Zero-Emission Airport Shuttle regulation; and
 - c. California’s Heavy-Duty Engine and Vehicle Omnibus regulation to reduce NO_x and [particulate matter] emissions from heavy-duty trucks while the market transitions to ZEVs.¹²

To date, six states—California, Massachusetts, New Jersey, New York, Oregon, and Washington—have adopted the ACT regulation. Collectively, these states represent approximately 17 percent of the new Class 2b-8 MHD vehicle sales market.¹³ California, Massachusetts, and Oregon have also adopted the Omnibus Low-NO_x regulation. Other states are actively working to adopt these rules.

III. EPA Should Grant California’s Requests for Waivers of Preemption.

a. Overview

For half a century, through multiple revisions, and across Republican and Democratic administrations and Congresses, our nation has had in place a basic architecture of “cooperative federalism” for protecting public health from air pollution. This fundamental approach depends upon dual federal and state regulation under the CAA to deliver healthy air. Pursuant to this structure, the federal government establishes nationwide public health air quality standards, and the states retain the responsibility for devising strategies to meet these standards.¹⁴ Indeed, “so long as the ultimate effect of the State’s choice of emissions limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emissions limitations it deems best suited to its particular situation.”¹⁵

The structure and legislative history of the CAA reflects an intent to prevent the federal government from second-guessing state policy choices.¹⁶ As part of this fundamental design, Congress has granted to California special and broad latitude to undertake motor vehicle emissions controls and has recognized the authority of other states to align their standards with California.¹⁷ This approach acknowledges California’s leadership and capabilities in establishing motor vehicle emissions controls, as well as its unique air quality challenges, and has

¹² *Id.* at 31-32. The Advanced Clean Fleets regulation, which would require fleets that are well suited for electrification (i.e., drayage fleets, public fleets, federal fleets, and other high-priority fleets) is under development in California. See California Air Resources Board, Advanced Clean Fleets, <https://ww2.arb.ca.gov/our-work/programs/advanced-clean-fleets> (visited July 18, 2022).

¹³ Atlas Public Policy, EV Hub, <https://www.atlasevhub.com/materials/medium-and-heavy-duty-vehicle-registrations-dashboard/#06f2a5dfc39daf9cc> (visited July 18, 2022) (2021 IHS market data).

¹⁴ See, e.g., *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 845-46 (1984); *Train v. Natural Res. Defense Council, Inc.*, 421 U.S. 60, 64-65 (1975).

¹⁵ *Train*, 421 U.S. at 79.

¹⁶ *Id.*

¹⁷ “Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s Advanced Clean Car Program,” 78 Fed. Reg. 2112, 2115 (Jan. 9, 2013).

consistently guided EPA's review and approval of the State's waiver applications under the highly permissive and narrow test set forth in Section 209(b) of the CAA.

b. Section 209(b) of the Clean Air Act

Section 209(a) of the CAA generally preempts states from adopting or attempting to enforce any new motor vehicle emissions standards or vehicle certification requirements.¹⁸ However, Section 209(b) requires EPA to grant California a waiver of preemption if “the State determines that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards,” unless EPA finds that: (1) California's determination was “arbitrary and capricious,” (2) California “does not need such state standards to meet compelling and extraordinary conditions,” or (3) California's “standards and accompanying enforcement procedures are not consistent with Section 202(a) of the [CAA].”¹⁹ The D.C. Circuit has explained that EPA “is not to overturn California's judgment lightly,” that California must have “the broadest possible discretion in selecting the best means to protect the health of its citizens,” and that the state may “blaze its own trail with a minimum of federal oversight.”²⁰

c. California's Regulations Satisfy the Requirements of Section 209(b)

“The language of the statute and its legislative history indicate that California's regulations, and California's determination that they comply with the statute, when presented to the [EPA] Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them.”²¹ Indeed, EPA has consistently interpreted Section 209(b) as placing the burden on the opponents of a waiver to demonstrate that one of the statutory criterion for a denial has been met.²² “Thus, EPA's practice has been to defer and not to intrude in policy decisions made by California in adopting standards for protecting the health and welfare of its citizens.”²³

California's ACT, ZEAS, and ZEP Certification regulations, Omnibus Low-NO_x regulation, and Heavy-Duty Vehicle and Engine Emissions Warranty and Maintenance regulations are presumed to satisfy the highly permissive and narrow requirements of Section 209(b). In any case, the materials submitted by the California Air Resources Board in support of each waiver request provide ample justification for EPA to issue a waiver of preemption for each set of regulations.

d. The Northeast States Depend on California's Regulations

Section 177 of the CAA provides important flexibility and latitude to states other than California to reduce motor vehicle emissions by allowing most states to “opt-in” to California's standards for which a waiver has been granted under Section 209(b).²⁴

¹⁸ CAA § 209(a), 42 U.S.C. § 7543(a).

¹⁹ CAA § 209(b), 42 U.S.C. § 7543(b).

²⁰ *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.2d 449, 463 (D.C. Cir. 1998) (citations omitted).

²¹ *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1121 (D.C. Cir. 1979) (EPA may not disregard California's determination absent “clear and compelling evidence” to the contrary).

²² 86 Fed. Reg. 22421 (April 28, 2021), at 22423 (citations omitted).

²³ *Id.* (citation omitted).

²⁴ This authority is entirely permissive: EPA does not need to approve state adoption of the standards, EPA cannot veto state adoption of the standards, and EPA cannot implement or impose additional conditions on state adoption of the standards. *See, e.g., Motor Vehicle Mfrs. Ass'n v. NYSDEC*, 17 F.3d 521, 535 (2d Cir. 1994).

Many of the NESCAUM states and other jurisdictions participating in the MHD ZEV initiative have economy-wide or transportation sector-specific GHG reduction requirements or goals. Many of these jurisdictions also suffer from persistent non-attainment with National Ambient Air Quality Standards for ozone.²⁵ Residents in communities throughout the Northeast experience substantial health and economic impacts and inequities due to exposure to unhealthy levels of PM_{2.5} and other pollutants. Many states are relying on California's MHD vehicle regulations for their air pollution control and climate change mitigation plans and programs.

IV. Conclusion

California's ACT, ZEAS, and ZEP Certification regulations, Omnibus Low-NO_x regulation, and Heavy-Duty Vehicle and Engine Emissions Warranty and Maintenance regulations satisfy the highly permissive and narrow requirements for a waiver of preemption under Section 209(b) of the CAA. California and other states depend on these rules to achieve their climate, air quality, and equity goals.

The United States has released more carbon dioxide (CO₂) into the atmosphere than any country in history and remains the second largest global emitter today.²⁶ Global CO₂ emissions reached their highest ever annual level in 2021.²⁷ Moreover, as truck freight volumes continue to increase, pollution from MHD vehicles will present an increasingly greater public health risk to communities located near heavy truck traffic. The Northeast states have long been at the forefront of national efforts to address climate change and air pollution. Given recent developments at the federal level, it is critically important now more than ever that states have the regulatory tools they need to substantially reduce GHGs and air pollution in the near term.

For all of these reasons, NESCAUM strongly supports California's requests for waivers of preemption and urges EPA to promptly grant each request in its entirety.

Sincerely,



Paul J. Miller
Executive Director

cc: NESCAUM Directors
Lynne Hamjian, Cynthia Greene, EPA R1
Richard Ruvo, EPA R2

²⁵ See, e.g., NESCAUM, Comments to EPA Re: Proposed Rule – Control of Air Pollution From New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards (May 16, 2022), <https://www.nescaum.org/documents/nescaum-comments-epa-hd-engines-vehicles-nprm-20220516-final.pdf>.

²⁶ See CarbonBrief, *Analysis: Which countries are historically responsible for climate change?* (October 5, 2021), <https://www.carbonbrief.org/analysis-which-countries-are-historically-responsible-for-climate-change/>.

²⁷ International Energy Agency, *Global Energy Review: CO₂ Emissions in 2021* (March 2022), <https://www.iea.org/reports/global-energy-review-co2-emissions-in-2021-2>.