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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

272 MD 2023

PETERS BROTHERS, INC.;
H.R. EWELL, INC.;
MOTOR TRUCK EQUIPMENT COMPANY d/b/a
KENSWORTH OF PENNSYLVANIA; TRANSTEK, INC.; and
PENNSYLVANIA MOTOR TRUCK ASSOCIATION, Petitioners

v.

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE COMMONWEALTH OF PENNSYLVANIA;
PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PENNSYLVANIA; and
JESSICA SHIRLEY, in her official capacity as Interim Acting Secretary of the Department of Environmental Protection, Respondents

THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENVIRONMENTAL QUALITY BOARD REPLY BRIEF IN RESPONSE TO PETITIONERS' BRIEF IN OPPOSITION TO RESPONDENTS' PRELIMINARY OBJECTIONS

CAROLINA DIGIORGIO
Chief Counsel

JESSE C. WALKER
Assistant Counsel
Attorney ID No. 317750
Department of Environmental Protection

ROBERT A. REILEY
Attorney ID No. 61319
Counsel
Environmental Quality Board
Office of Chief Counsel
400 Market Street, 9th Floor
P.O. Box 8464
Harrisburg, PA 17105-8464

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INTRODUCTION

Respondents Commonwealth of Pennsylvania, Department of Environmental Protection, ("DEP") Environmental Quality Board ("EQB"), and Jessica Shirley, acting in her official capacity as Interim Acting Secretary of DEP, (collectively "Agencies") respectfully submit this Reply Brief in Response to the Brief filed by Petitioners Peters Brothers, Inc., H.R. Ewell, Inc., Motor Truck Equipment Company d/b/a Kenworth of Pennsylvania, Transteck, Inc. and the Pennsylvania Motor Truck Association ("Truckers") in Opposition to the Agencies' Preliminary Objections.[1]

This Reply Brief addresses specific errors and flawed arguments and claims advanced by Truckers in their Brief. For the reasons set forth below, along with those advanced in Agencies' Preliminary Objections and Brief in Support of Preliminary Objections, Agencies' Preliminary Objections[2] should be sustained. If this Court sustains any one of these preliminary objections, Truckers' Petition for Review ("Petition") should be dismissed with prejudice.

[1] Truckers' Brief in Opposition to Agencies' Preliminary Objections shall be identified as "Pet. Br."

[2] Agencies' Brief in Support of Preliminary Objections Agencies' Preliminary Objections shall be identified as "Resp. Br."

ARGUMENT

I. Reply to Response to Preliminary Objection 1: Truckers Are Not Entitled to Relief Under the Declaratory Judgments Act

A. Truckers Rely on Case Law that Is Inapposite

Truckers incorrectly assert that they have standing to bring the Petition and that their claims are ripe. Truckers primarily rely on four cases to establish standing and ripeness and support their assertion that they face direct and immediate harm from the suspended Pennsylvania Heavy-Duty Diesel Regulation ("PA HDD Regulation"):[3] *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467 (Pa. 2021); *EQT Prod. Co. v. Dep't of Env't Prot*., 130 A.3d 752 (Pa. 2015); *Arsenal Coal Co. v. Dep't of Env't Res*., 477 A.2d 1333 (Pa. 1984); and *Bayada Nurses, Inc. v. Dep't of Lab. & Indus*., 8 A.3d 866 (Pa. 2010). However, these decisions are inapposite and do not support Truckers' standing claim.

Unlike the situations in the cases Truckers rely upon, the situation confronting Truckers is not one where the government is actively enforcing, on the verge of enforcing, or even intends to enforce a legal requirement against the petitioner. In the instant matter, DEP announced its intent to enforce the PA HDD Regulation by January 2, 2026. 53 Pa. B. 3166 (June 10, 2023). By 2026, the facts will likely change. So, by reviewing this now the Court may be considering something that

[3]32 Pa. B. 2327 (May 11, 2002) codified at 25 Pa. Code §§ 126.501 – 126.531 (Pennsylvania Heavy-Duty Diesel Emissions Control Program).

may never happen. Moreover, there would be sufficient time for this Court to review this matter at a later date should that be appropriate. But to do so now would be offer an advisory opinion.

In *Bayada*, the agency was actively enforcing a regulation by informing Bayada that the agency was going to audit Bayada even though the audit never occurred. 8 A.3d at 870. In *Arsenal,* the agency signaled its intention to "apply[] the regulations," through exercising some flexibility. 477 A.2d at 1340. In *Papenfuse*, the city stated publicly that it was actively enforcing its gun ordinance. 261 A.3d at 471, 487. In *EQT*, the agency actively sought to enforce violations of The Clean Streams Law, 35 P.S. §§ 691.1–691.1010, through a proposed civil penalty and a complaint for civil penalties. 130 A.3d at 754, 755. Truckers' reliance on these cases is misplaced; they do not demonstrate standing and ripeness in the instant matter.

The instant matter is in sharp contrast to the cases Truckers rely upon. Rather than enforcing the regulation or announcing their intent to enforce the regulation, here Agencies publicly expressed their intent *not to enforce* the PA HDD Regulation. DEP suspended enforcement of the PA HDD Regulation by issuing and publishing two suspension notices *before* the Warranty Requirement[4] and Emissions

[4] The 2018 California HDD Warranty Requirement is comprised of amendments to Title 13, California Code of Regulations. However, DEP could not enforce these new provisions until the

Amendment[5]—to the California HDD Regulation[6] that is incorporated by reference in the PA HDD Regulation—became enforceable in Pennsylvania. 51 Pa. B. 7000 (November 6, 2021) and 53 Pa. B. 3166 (June 10, 2023).

Further, none of Truckers' cases found standing and ripeness or case or controversy based on mere speculation of future third-party enforcement, as Truckers assert here. None of Truckers' cases involved a federal law—like section 177 of the Clean Air Act ("CAA"), 42 U.S.C. § 7507—that precludes a state agency or third party from enforcing a regulation until the EPA grants a waiver approval. Such a law applies in this matter. Under section 177 of the CAA, Pennsylvania cannot enforce the PA HDD Regulation Emissions Amendment until the EPA grants a waiver under section 209(b) of the CAA, 42 U.S.C. § 7543(b), for the amendment. *See MVMA v. NYSDEC*, 17 F. 3d 521, 534 (2d Cir. 1994) (though a state may adopt a California vehicle emission standard regulation, the regulation cannot be enforced unless and until EPA grants a waiver).

Further, the instant matter is not ripe for review because Agencies have not enforced the PA HDD Regulation against Truckers or any other party, nor has any

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U.S. Environmental Protection Agency ("EPA") granted California's waiver request, which happened in 2023. 88 Fed. Reg. 20688 (Apr. 6, 2023).

[5] The 2021 California HDD Emissions Amendment is comprised of new Title 13, California Code of Regulations sections. California has applied to EPA for a CAA waiver for the Emissions Amendment. 87 Fed. Reg. 35765 (June 13, 2022). EPA, however, has taken no action on California's waiver request. Therefore, DEP is unable to enforce these new provisions at this time.

[6] 13 CCR Division 3, Chapter 1, Article 2.

intent to commence enforcement been shown. Indeed, DEP's only activity was issuing two suspensions of enforcement of the PA HDD Regulation. Truckers' allegations regarding enforcement, costs, and business harms are hypothetical and speculative rather than direct and immediate. *See e.g.,* Pet. Br. 5. Lifting the enforcement suspension would not occur, if at all, before January 2, 2026. Reviewing this action now would waste judicial resources. There will be ample time for the Court to review the regulation in the future. Accordingly, no actual controversy exists, and Truckers have not established standing and ripeness.

B. Truckers' Are Not Subject to the Emissions Amendment

As a matter of federal law, DEP cannot enforce the Emissions Amendment because EPA has not granted a CAA waiver to California under section 209(b), 42 U.S.C. § 7543(b). Because the Emissions Amendment has not been, and cannot be, enforced against Truckers, they are not aggrieved. Nevertheless, Truckers continue to claim that they face a risk of future enforcement of the Emissions Amendment in Pennsylvania. Pet. Br. 20-22.

EPA has not granted a waiver to California under section 209(b) of the CAA, for the Emissions Amendment.[7] It is settled law that states may adopt, but not enforce, California engine and vehicle regulations before EPA has acted on a waiver request. 17 F.3d at 534. Thus, neither DEP nor any third party can enforce the

[7] *Supra* note 5.

Emissions Amendment against Truckers, and no actual controversy exists with respect to the Emissions Amendment, because the amendment cannot be enforced. So, Truckers fail to meet the standing and ripeness requirements necessary to seek declaratory relief.

II. Reply to Response to Preliminary Objection No. 2: Truckers' Arguments that the APCA Does Not Bar Pre-Enforcement Review are Meritless

A. Truckers' Assertion that Their Petition Does Not Implicate Section 4.2(b) of the APCA Is Incorrect

Truckers claim that section 4.2(b) of the Air Pollution Control Act ("APCA"), Act of January 8, 1960, P.L. 2119 (1959), *as amended,* 35 P.S. § 4004.2(b), which applies to regulations that are more stringent than required by the CAA, does not apply to its Petition, because they do not contend the PA HDD Regulation is more stringent than necessary. Thus, Truckers claim, pre-enforcement review is not barred under section 4.2(e) of the APCA, 35 P.S. § 4004.2(e), which bars pre-enforcement review of regulations subject to section 4.2(b). Pet. Br. 23. However, Truckers' own words refute this argument.

In several places in their Petition and Brief, Truckers assert that the PA HDD Regulation is overly stringent and because of that stringency it will drive up compliance costs. Petition ¶¶ 34, 62 and 66; and Pet. Br. 4, 5 and 34.[8] For instance,

[8] *See also* Truckers' Petition Declaration of Rebecca Oyler at ¶¶ 9, 11 and 15; Declaration of Kenton Good at ¶¶ 8, 9, 13, 22, and 27; and Declaration of Calvin Ewell at ¶¶ 11 and 13.

Truckers aver, "[T]hese new, and dramatically more stringent, emission standards are problematic," and the "increasingly stringent emission standards are expected to dramatically increase the cost." Pet. Br. 5. Truckers' words plainly show that they seek to overturn the PA HDD Regulation because of its stringency.

The PA HDD Regulation rulemaking record shows that section 4.2(b), 35 P.S. § 4004.2(b), applied to the regulations. EQB found that, to the extent the regulation was more stringent than any federal requirements, the regulation was necessary to achieve and maintain the national ambient air quality standards ("NAAQS").[9] 32 Pa. B. 2327, 2329 and 2333. This regulatory finding directly implicates section 4.2 (b) of the APCA. Without that finding, EQB would have been precluded from adopting the PA HDD Regulation because it was more stringent than required under federal law at the time. It follows that Truckers' claim that their Petition challenging the PA HDD Regulation does not invoke or rely on sections 4.2(b) is incorrect.

Nevertheless, Truckers claim that they are not barred from pre-enforcement review under section 4.2(b) of the APCA, because Agencies promulgated the PA HDD Regulation under sections 5(a)(1) and (7) of the APCA, 35 P.S. § 4005(a)(1) and (7), and not section 4.2(a) of the APCA. Pet. Br. 27-28. This claim is contrary to the plain language of the APCA.

[9] EPA has established NAAQS for six criteria pollutants (ozone, particulate matter, carbon monoxide, sulfur dioxide, nitrogen dioxide and lead) under sections 108 and 109 of the CAA, 42 U.S.C. §§ 7408 and 7409.

A brief explanation of the relationship and role of sections 4.2(a) and 4.2(b) of the APCA, 35 P.S. §§ 4004.2(a), 4004.2(b), is necessary before going further. Section 4.2(a) of the APCA is Pennsylvania's general rulemaking authority when implementing NAAQS under section 109 of the CAA, 42 U.S.C. § 7409, and generally prohibits regulations that are more stringent than required by the CAA. However, section 4.2(b) relaxes the rulemaking limits in section 4.2(a) when necessary to achieve certain things, including achieving or maintaining the NAAQS. Thus, section 4.2(a) and section 4.2(b) of the APCA work together to define limitations on EQB's APCA rulemaking authority.

Truckers' claim that nothing in the rulemaking record shows that EQB was exercising its rulemaking authority under section 4.2(a) of the APCA, 35 P.S. § 4004.2(a). Pet. Br. 27-28. This assertion is fundamentally flawed. Section 4.2 of the APCA does not contain rulemaking authority. Pet. Br. 28. Rather, as shown above, section 4.2(a) establishes limits on EQB's rulemaking authority to adopt control measures or requirements. Hence, there was no reason for EQB to identify section 4.2(a) of the APCA, because it is a limitation on rulemaking, not an authority for rulemaking. In other words, section 4.2(a) does not provide a basis to *promulgate* a rule, but rather a possible basis to *challenge* a rule.

Further, the rulemaking record contradicts Truckers' assertion that EQB did not account for the limitation in section 4.2(a) and section 4.2(b) of the APCA, 35

P.S. § 4004.2(a), (b), in the PA HDD Regulation. EQB findings, Section J of the Final PA HDD Regulation preamble, states "This final-form rulemaking is necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this Preamble *and is reasonably necessary to achieve and maintain the National ambient air quality standards for ozone*." 32 Pa. B. at 2333 (emphasis added). This language shows that EQB was mindful of the limitations in sections 4.2(a) and 4.2(b) of the APCA and EQB's conclusion that the rulemaking was within those limits.

As a result, because section 4.2(b) of the APCA was implicated by PA's HDD Regulation rulemaking, Truckers' pre-enforcement challenge to the PA HDD Regulation's incorporation of the Warranty Requirement and Emissions Amendment is barred under section 4.2(e) of the APCA.

B. Truckers' Arguments that Section 4.2(e) of the APCA Must be Interpreted to Allow Their Pre-Enforcement Review Challenge Have No Merit

1. The Plain Language of section 4.2(e) of the APCA Prohibits Pre-Enforcement Review

Though Truckers labor to craft an interpretation of section 4.2(e) of the APCA, 35 P.S. § 4004.2(e), that allow their Petition to proceed, these arguments have no merit. Pet. Br. 26-27 and 29-32. First, Truckers argue that section 4.2(e) pertains only to "substantive" pre-enforcement review but does not prohibit pre-

enforcement review into whether proper rulemaking procedures were used or whether Agencies acted "ultra vires." Pet. Br. 25.

However, this argument is rebutted by the unambiguous language of section 4.2(e), which broadly prohibits pre-enforcement review. Section 4.2(e) states:

> (e) No person may file a preenforcement review challenge under this section based in any manner upon the standards set forth in subsection (b) of this section.

35 P.S. § 4004.2(e)

Section 4.2(e) contains no qualifications; it bars *"any manner"* of pre-enforcement challenges to standards identified in section 4.2(b). *See Mohamed v. Bur. of Motor Vehicles*, 40 A. 3d 1186, 1193, 1194-1195 (Pa. 2012) (In discerning the General Assembly's intent, the court first resorts to the language of the statute itself). The plain language of section 4.2(e) provides no basis for separating substantive pre-enforcement challenges from procedural, *ultra vires* and constitutional challenges, as Truckers suggest. *Id*. Section 4.2(e)'s bar applies to "any manner" of pre-enforcement challenge that implicates standards under section 4.2(b) of the APCA. *See* 1 Pa. C.S. § 1921 (Disfavoring surplusage). Thus, Truckers' distinctions are not supported by the statutory text and must be rejected. Pre-enforcement review is comprehensively prohibited by section 4.2(e).

Moreover, the case law Truckers rely on is inapposite here and does not apply. Pet. Br. 26-27 and 29-32. Both *Machipongo Land and Coal Co., Inc. v. Dept. of*

Env't Res., 676 A.2d 199 (Pa. 1996), and *Machipongo Land and Coal Co., Inc. v. Dept. of Env't Res.,* 648 A.2d 767 (Pa. 1994), related to jurisdictional issues associated with the Commonwealth Court and Environmental Hearing Board, respectively. In *Duquesne Light Co., Inc. v. Dept. of Env't Prot.,* 724 A.2d 413 (Pa. Cmwlth. 1999), this Court found a petition seeking pre-enforcement of air quality regulations promulgated under the APCA was not ripe because DEP had not taken any action against Duquesne concerning the regulations.

These decisions do not address section 4.2(e) of the APCA, 35 P.S. § 4004.2(e). Moreover, none of these cases involved courts overriding a state statute in which the legislature expressly barred any pre-enforcement challenge to a public health and welfare regulation, as Truckers seek to do here. This pre-enforcement bar is in place to, among other things achieve the NAAQS and prevent the imposition of CAA sanctions. *See* 35 P.S. § 4004.2(b)(1)-(4); *see also* 42 U.S.C. § 7509. Because section 4.2(e) of the APCA broadly prohibits pre-enforcement review challenges under section 4.2(b) of the APCA, 35 P.S. § 4004.2(b), Truckers Petition must be rejected.

2. Truckers' Narrow Interpretation of Section 4.2(e) of the APCA Would Undermine the Purpose of Protecting Regulations to Achieve and Maintain the NAAQS and Public Health

Truckers' pre-enforcement review challenge of the PA HDD Regulation must be rejected because it would defeat the purpose of protecting measures that are

needed to achieve and maintain the public health-based NAAQS established under section 109 of the CAA, 42 U.S.C. § 7409.

Under the Pennsylvania Rules of Statutory Construction, the General Assembly is presumed to favor the public interest as against any private interest. 1 Pa. C.S. § 1922(5). Applying this presumption to section 4.2 of the APCA, 35 P.S. § 4004.2, the General Assembly intended to favor the public interest as against any private interest by enacting protections to rulemakings promulgated to achieve and maintain the NAAQS. This can be seen in various provisions under section 4.2. For example, section 4.2(d) of the APCA puts the burden on a person challenging enforcement to demonstrate that "the control measure, requirement or stringency of the requirement is not reasonably required to achieve or maintain the NAAQS or to satisfy related Clean Air Act requirements." 35 P.S. § 4004.2(d). Similarly, in section 4.2(e), 35 P.S. § 4004.2(e), the General Assembly favored the public interest by prohibiting private interests from advancing pre-enforcement challenges seeking to undo air quality regulations promulgated to protect public health and the environment through the achievement and maintenance of the NAAQS as Truckers seek to do here. *See* 35 P.S. § 4004.2(b)(1).

Thus, the statutory presumption to interpret section 4.2(e) of the APCA, 35 P.S. § 4004.2(e), to favor public interest over private interests defeats Truckers' arguments for pre-enforcement review.

3. Truckers Alleged Due Process Violations Are Unsupported

Finally, none of the state and federal case law Truckers rely on supports their suggestion of a due process violation in the instant matter. Pet. Br. 29-32. In *S.F. v. Pa. Dept. of Hum. Serv.*, 298 A.3d 495 (Pa. Cmwlth. 2023), the court found that a provision that automatically placed a teacher on the child abuse registry prior to an opportunity for a hearing violated due process under the Pennsylvania and U.S. Constitutions. It was a case premised on pre-deprivation, not pre-enforcement. In *Ex Parte Young*, 209 U.S. 123 (1908), the U.S. Supreme Court held that a state statute violated due process where the statute provided for establishing railroad transportation rates without giving the railroad corporation an opportunity to be heard. It was a case premised on the 11th Amendment to the U.S. Constitution and one decided long before the APCA was a twinkle in the eye of the Pennsylvania legislature. Citing these cases also shows how wildly misplaced the Truckers' argument actually is.

In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) the petitioner sought pre-enforcement review of a Mine Health Safety Act provision and its implementing regulations and alleged that proceeding through the statutory review process would violate the Due Process Clause. *Id.* at 205-206. In rejecting this argument, the court found that Congress intended to prohibit pre-enforcement review under that provision of the statute and, thus, did not violate due process even though penalties

would be incurred during the review process. Unlike *Ex Parte Young*, the petitioner would have access to judicial review before any fine or penalty had to be paid. *Id.* at 217-218.

While Truckers cite to *Thunder Basin* to support their entitlement to pre-enforcement review claim, *Thunder Basin* does not support Truckers' position. The narrowly focused prohibition on pre-enforcement review upheld in *Thunder Basin* is analogous to the narrow restraint on pre-enforcement review in section 4.2(e) of the APCA, 35 P.S. § 4004.2(e). In each, the pre-enforcement review limitation only applies to a narrow and limited portion of the statutory regulatory program. Further, like *Thunder Basin*, *Ex Parte Young* does not apply to section 4.2(e) because there is no due process violation. Section 4.2(e)'s pre-enforcement review limitation does not foreclose administrative or judicial review. Nothing in section 4.2(b) divests a party subject to a regulation that implicates section 4.2(b) of its rights to challenge any enforcement action or penalty sought by the government or third-party administrative tribunals and courts. Of course, enforcement or imposing a penalty under the PA HDD Regulation is only theoretical here because DEP suspended enforcement of the PA HDD Regulation and no enforcement action has occurred or is foreseeable.

Importantly, unlike *S.F., Ex eagle Young,* and *Thunder Basin*, Truckers had notice and an opportunity to comment on the proposed PA HDD Regulation in 2002

and the opportunity to comment on the California's Warranty Requirement and Emissions Regulation rulemakings. 31 Pa. B. 4958; *see* Resp. Br. at 18, n. 10. In the case of the former rulemaking, the rulemaking record shows that the American Trucking Associations ("ATA") submitted comments on behalf of their members which includes the Pennsylvania Motor Truck Association. (Attached ATA Comments). Those comments, like the Truckers' pleadings in this instant matter, took issue with the costs associated with the Warranty Requirement under the California HDD Regulation.

The foregoing shows that Truckers failed to establish a due process violation that could undermine the pre-enforcement review limitation in section 4.2(e) of the APCA, 35 P.S. § 4004.2(e).

III. Reply to Response to Preliminary Objection No. 3: Measures to Assure That Pollution Control Equipment Continues to Properly Operate Is Within Agencies' Authority

A. The Warranty Requirement is a Measure to Control and Reduce Pollution From HDD Engines and Trucks

Truckers inappropriately characterize the Warranty Requirement as a financial regulation. Pet. Br. 32-34. In fact, the Warranty Requirement reduces emissions of nitrogen oxides, particulate matter, and other air pollutants that negatively impact public health by keeping HDD engines and trucks in proper operating condition. Resp. Br. 17. California's Warranty Requirement rulemaking was promulgated to assure that HDD engines and trucks continue to operate as

certified, to mitigate durability issues associated with emission control systems, and reduce instances of tampering and poor maintenance. *See* HD Warranty, 2018 Public Notice and Related Material Initial Statement of Reasons at ES-2 to ES-5 available at https://ww2.arb.ca.gov/rulemaking/2018/hd-warranty-2018 (last visited Dec. 18, 2023). These reasons are consistent with the emission reduction and public health basis for Agencies' adoption of the Final PA HDD Regulation in 2002. Resp. Br. 14-16.

The nondelegation doctrine governs the thing regulated and not the means of regulation. Here, the thing regulated is truck emissions, which undoubtedly falls within the delegation. The warranty requirement is a means to regulate truck emissions, so it's within the delegation of authority.

Moreover, Truckers' objections to the Warranty Requirement have been analyzed by the federal courts, and warranties have been determined to be part and parcel of a clean vehicle program like the one adopted by Agencies with the PA HDD Regulation. That is, three sections of the CAA—sections 202 (related to emission standards), 206 (related to engine testing) and 207 (related to engine warranties), 42 U.S.C. §§ 7521, 7525, and 7541—are all integral parts of a comprehensive vehicle emission regulatory program. *MEMA v. U.S. EPA,* 627 F.2d 1095, 1108 (D.C. Cir., 1979). All three sections are treated equally in section 209(a) of the CAA, 42 U.S.C. § 7543(a), as it relates to the EPA waiver requirement. 627

F.2d at 1108. This means that the identicality requirement in section 177 of the CAA, 42 U.S.C. § 7507, includes not only the emission standards but the accompanying enforcement (testing and warranty) procedures too. Thus, states that opt into the California emission standards also must incorporate the warranty provisions.

B. Agencies Have Authority to Assure HDD Engine and Truck Emission Control Systems and Parts Continue to Operate as Certified

The Warranty Requirement is authorized by both provisions, sections 5(a)(1) and 5(a)(7), of the APCA. They authorize the regulation of vehicle emissions and establishes control efficiency for HDD engines by assuring that the HDD engine and control equipment continues to operate as certified to control pollution. EQB recognized that it possessed statutory authority to promulgate the PA HDD Regulation when EQB published the final regulation in the *Pennsylvania Bulletin*. 32 Pa. B. 2327, 2329 and 2333.

Under section 5(a)(1) of the APCA, the General Assembly empowers EQB to adopt rules and regulations to, among other things,

> regulate any process or source or class of processes or sources[10], require the installation of specified control devices or equipment, or *designate the control efficiency of air pollution control devices or equipment required in specific processes or sources or classes of processes or sources*.

[10] The term "air contamination source" as defined in the APCA includes HDD engines and vehicles. Section 3 of APCA, 35 P.S. § 4003.

35 P.S. § 4005(a)(1) (emphasis added). The final phrase in section 5(a)(1) of the APCA directly comports with the CAA's comprehensive approach to engine and vehicle emissions regulation. That is, emission standards, engine testing and engine warranties, are all integral parts of a comprehensive vehicle emission regulatory program. 627 F.2d at 1108. *See* Section III.A*, supra. See also* sections 202, 206, and 207 of the CAA, 42 U.S.C. §§ 7521, 7525, and 7541. In addition, section 5(a)(7) of the APCA, 35 P.S. § 4005(a)(7), grants Agencies authority to adopt regulations designed to reduce emissions from motor vehicles.

Truckers rely on two cases where an agency lacked authority to support their claim that Agencies lacked authority to promulgate a warranty requirement under the APCA. *Sunrise Energy, LCC v. FirstEnergy Corp*., 148 A.3d 894, 907 (Pa. Cmwlth. 2016) and *Pa. Ass'n of Life Underwriters v. Dep't of Ins.*, 371 A.2d 564, 566 (Pa. Cmwlth. 1977). These cases are not analogous to the instant matter but stand for the general proposition that powers exercised by an agency must be conferred by the legislature in express terms. Their reliance on these cases is misplaced because EQB's adoption of the California HDD Regulation is within the scope of its APCA authority.

Truckers try to diminish the regulatory authority conferred on EQB by parsing of the APCA's words, emphasizing that section 5(a)(1) and 5(a)(7), 35 P.S. § 4005(a)(1) and (7), do not contain the word "warranty." No court has ever

interpreted nondelegation so narrowly. Truckers' linguistic argument obscures the plain meaning and breadth of authority of sections 5(a)(1) and 5(a)(7) of the APCA. *See* Pet. Br. 33-34. It would be absurd and contrary to the public interest to conclude that the authority to regulate emissions from motor vehicles, and to regulate control efficiency of sources, would not include the authority to assure the upkeep, maintenance and repair of the equipment, so that the equipment continues to control emissions. Such an interpretation would be contrary the Rules of Statutory Construction. 1 Pa.C.S. § 1922.

The D.C. Circuit's thinking in *MEMA* persuasively explains why the Warranty Regulation is part and parcel of regulating emissions and sources. The court stated:

> Thus on petitioners' reading the statute permits California to establish emission standards and certification procedures, but forbids it from ensuring that the standards are effective once the motor vehicle leaves the showroom. Yet the only time that a new motor vehicle is capable of polluting the environment is when it is out on the road. The purpose of the Clean Air Act is to reach precisely that kind of pollution.

627 F.2d at 1108.

It follows that EQB possesses the authority to adopt the California Warranty Requirement, as incorporated by reference through the PA HDD Regulation, under federal and state law.

IV. Reply to Response to Preliminary Objection No. 4: Amendments to the PA HDD Regulation Required No Further Consultation with PennDOT

Truckers further allege that Agencies must consult with PennDOT every time the California HDD Regulation is updated to incorporate revised standards. Pet. Br. 36-37. This claim is incorrect.

It is undisputed that Agencies consulted PennDOT during the proposed PA HDD Regulation rulemaking which incorporated the California HDD Regulation. Truckers do not point to any requirement under the APCA or any other legal provision that requires further consultation with PennDOT for future revisions to the California HDD Regulation to be incorporated into the PA HDD Regulation.

Agencies demonstrated in their opening brief that automatic incorporation of amendments to the California HDD Regulation is required by state and federal law. Resp. Br. 52-54. Section 5(a)(8) of the APCA, 35 P.S. § 4005(a)(8), requires vehicle emission standard regulations promulgated by EQB to be consistent with the federal CAA, and section 177 of the CAA, 42 U.S.C. § 7507, requires that a state may only adopt the identical California vehicle standards for which EPA has granted a waiver. Resp. Br. 36-39. Further, the rules of statutory construction, 1 Pa.C.S. § 1937(a), provide for automatic incorporation of revisions of incorporated laws and regulations. Resp. Br. 52-54.

Truckers assert, without support, that the federal HDD Regulation should become applicable in Pennsylvania each time California amends its HDD Regulation

until EQB promulgates a separate rulemaking codifying the California HDD Regulation amendment in Pennsylvania. Pet. Br. 37. As the prior paragraph and Agencies' opening brief shows, this assertion is contrary to the legislative intent as revealed in the APCA and the CAA. Resp. Br. 36-39 and 52-54. After opting into the California HDD Regulation, a state is required to maintain a regulatory program identical to California's regulatory program.

The foregoing shows that Truckers' position is contrary to federal and state law and, therefore, cannot be implemented.

V. Reply to Response to Preliminary Objection No. 5: The General Assembly Made Basic Policy Choices and EQB Exercised Its Authority Within the Boundaries Established Under the APCA.

A. Truckers Ignore Basic Policy Choices Made by the General Assembly in the APCA

By arguing that Agencies violated the non-delegation doctrine by promulgating the PA HDD Regulation, Truckers ignore the basic policy choices made by the General Assembly that support the PA HDD Regulation. Pet. Br. 37.

The basic policy choices that the General Assembly made when it enacted the APCA included providing EQB with the duty and power to

> [a]dopt rules and regulations for the prevention, control, reduction and abatement of air pollution, applicable throughout the Commonwealth … which shall be applicable to all air contamination sources" and designate the control efficiency of air pollution control devices or equipment required in specific processes or sources or classes of processes or sources.
>
> …

> [a]dopt rules and regulations designed to reduce emissions from motor vehicles.
>
> …
>
> [a]dopt rules and regulations to implement the provisions of the Clean Air Act [that are] consistent with the requirements of the Clean Air Act and regulations.

35 P.S. § 4005(a)(1), (7), and (8).

Similarly, the General Assembly vested DEP with the duty and power to implement the CAA provisions and to evaluate motor vehicle emission control programs, including vehicle emission standards with respect to their effect upon air pollution and determine the need for modifications of such programs. 35 P.S. § 4004(1) and (16).

Agencies are the subject matter experts in air quality. They exercised informed discretion by adopting the California HDD Regulation and incorporating it by reference into the PA HDD Regulation. This decision was based on Pennsylvania's need to achieve and maintain the ozone NAAQS, and to avoid backsliding in air quality to protect public health. *See* Resp. Br. 46, 47 (citing *Eagle Environmental, II, L.P., v. Dept. of Env't Prot.*, 884 A.2d 867, 880 (Pa. 2015); *Marcellus Shale Coalition v. Dept. of Env't Prot*., 292 A.3d 921, 949-950 (Pa. 2023)). Because Agencies exercised this discretion within the confines of the basic policy choices made by the General Assembly in the APCA, the PA HDD Regulation does not violate the nondelegation doctrine.

B. Truckers Ignore Guidelines and Restraints on the Agencies Established by the General Assembly in the APCA

In their opening brief, Agencies showed that the General Assembly placed limits on EQB's broad rulemaking authority when implementing regulations to address section 109 of the CAA, 42 U.S.C. § 7409, which is the section that created the NAAQS. *See* Resp. Br. 48-51. Section 4.2(a) of the APCA, 35 P.S. § 4004.2(a), limits the promulgation authority to rules that meet the Commonwealth's CAA obligations under section 109 of the CAA "to achieve and maintain the ambient air quality standards or to satisfy related [CAA] requirements, unless otherwise specifically authorized or required by this act or specifically required by the [CAA]." 35 P.S. § 4004.2(a). Section 4.2(b) of the APCA further defines the limits EQB's rulemaking authority as follows: "[C]ontrol measures or other requirements adopted under subsection (a) of this section [section 4.2(a)] shall be no more stringent than those required by the [CAA] unless authorized or required by this act or specifically required by the [CAA]." 35 P.S. § 4004.2(b). However, section 4.2(b) also provides an exception: "this requirement shall *not apply* if the [EQB] determines that it is reasonably necessary for a control measure or other requirement to exceed minimum [CAA] requirements in order for the Commonwealth, among other things, to … achieve and maintain ambient air quality standards...." 35 P.S. § 4004.2(b) (emphasis added).

Any rulemaking promulgated by EQB to achieve and maintain the NAAQS must be consistent with limitations of section 4.2 of the APCA, 35 P.S. § 4004.2. Resp. Br. 49-50. The PA HDD Regulation is such a rulemaking.

Agencies complied with these APCA limitations in promulgating the PA HDD Regulation. *See* 32 Pa. B. at 2333. Consequently, Truckers' nondelegation doctrine claims are without merit because Agencies acted within the General Assembly's delegation and the limits imposed by the General Assembly.

C. The General Assembly Did Not Give EQB Open-Ended Rulemaking Authority

Truckers claim that, because the General Assembly did not expressly direct EQB that Pennsylvania should be aligned with the California HDD Regulation or federal HDD Regulation, the General Assembly improperly gave EQB open-ended rulemaking authority. Pet. Br. 38 n.14, and 40 and 42. This claim lacks support and must be rejected.

There is no question that the General Assembly delegated EQB authority to implement the CAA and regulate vehicle emissions, and placed limits on that authority. *See* Section V.B, *supra*. This authority, as limited in the APCA, is sufficient to authorize promulgation of the PA HDD Regulation. *Id.* Truckers have not shown that Pennsylvania law requires a more detailed and fine-grained delegation, or instructions by the General Assembly, to empower EQB.

Truckers' argument is also refuted by the rulemaking record for the PA HDD Regulation, which contains the General Assembly's approval of the PA HDD Regulation. *See* 32 Pa. B. at 2333.

Rulemakings like the PA HDD Regulation are promulgated in accordance with the requirements of several statutes: the APCA; the Regulatory Review Act, ("RRA") Act of June 25, 1982, P.L. 633, *as amended,* 71 P.S. §§ 745.1-745.15; the Commonwealth Attorneys Act, Act of October 15, 1980, P.L. 950, *as amended,* 71 P.S. §§ 732-101-732-506; the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, *as amended,* 45 P.S. §§ 1101-1611; and the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 232. These statutes constrain EQB from improperly exercising its authority.

The RRA in particular limits EQB from exercising "open-ended" authority. In the RAA, the General Assembly intended to provide oversight and review of regulations and to establish a method for ongoing and effective legislative review and oversight to foster executive branch accountability. 71 P.S. § 745.2. The House and Senate Committees received both the Proposed and Final PA HDD Regulation for review, 71 P.S. § 745.5(a), were provided copies of the comments received on the Proposed HDD Regulation, 71 P.S. § 745.5(c), and were provided copies of the approved final-form HDD rulemaking on April 15, 2002. *See* 32 Pa. B. at 2333. *See also* 71 P.S. § 745.5(d).

If the General Assembly found that EQB had gone too far and was exercising "open-ended" authority, the General Assembly could have objected. However, the legislature did not do so. To the contrary, the General Assembly endorsed EQB's exercise of its delegated authority by approving the PA HDD Regulation. 32 Pa. B. at 2333. Because the General Assembly approved adoption of California's HDD standards through incorporation by reference into the PA HDD Regulation without limitations consistent with the RRA, *see* 32 Pa. B. at 2333, Truckers' nondelegation claims are without merit.

D. The Case Law Truckers Rely Upon Does Not Show A Non-Delegation Violation

Truckers rely on *Protz v. Workers' Comp. Appeal Bd.,* 161 A.3d 827 (Pa. 2017) and *Commw. v. Sessoms,* 532 A.2d 775 (Pa. 1987), to assert that the General Assembly unconstitutionally delegated authority to EQB. However, neither case supports a conclusion that the General Assembly violated the non-delegation doctrine when it promulgated the APCA.

In *Protz*, the court held that the General Assembly violated the nondelegation doctrine by amending the Workers Compensation Act to require physicians to apply the methodology set forth in "the most recent edition" of the American Medical Association ("AMA") *Guides to the Evaluation of Permanent Impairment*. 161 A.3d at 830. The court found that the General Assembly unlawfully delegated open-ended

authority to the AMA, a private entity, without advancing any specific policies or prescribing any standards to guide and restrain the AMA's discretion. *Id*. at 835-836.

Protz does not control where, as here, the General Assembly delegates *limited* authority to a *government* entity. *See Estate of Chennisi*, 272 A.3d 67, 74, 77 (Pa. Super. 2022). *See also* Sections V.A and V.B, *supra*. In the APCA, the General Assembly made the basic policy choice to empower EQB to establish regulations to control pollution from motor vehicles and to implement the provisions of the federal CAA. 35 P.S. § 4005(a)(1) and (7). Also, unlike *Protz*, the APCA established guidelines and limitations on EQB's exercise of that authority to achieve the NAAQS as well as the stringency of such regulations. 35 P.S. § 4004.2(a) and (b). The APCA also mandates that any regulations promulgated by EQB must be consistent with the CAA, further limiting Agencies. 35 P.S. § 4005(a)(8).

Protz involved the unqualified adoption of guidelines promulgated by a non-governmental entity, the AMA, which had no procedural safeguards, such as public notice and comment and the opportunity for judicial review. But the instant matter involves one government entity, EQB, adopting requirements developed by another government entity, the California Air Resources Board ("CARB"). Unlike the AMA, CARB promulgated the California HDD Regulation pursuant to an administrative rulemaking process that requires public notice and comment, which

as noted earlier, the Truckers took advantage of by submitting comments through the American Trucking Associations. EQB adopted the California HDD Regulation through a similar public participation process. Thus, the prospective incorporation of AMA standards in *Protz* is materially different from EQB's adoption of the California HDD Regulation. The *Protz* delegation did not benefit from the safeguards of Pennsylvania administrative law, which did apply to EQB's adoption of the California HDD Regulation.

Truckers' reliance on *Sessoms* is also misplaced. *Sessoms* is a criminal case where a defendant who would have been sentenced under less stringent guidelines, that were the subject of a legislative veto, was instead sentenced under more stringent guidelines because of that veto. 532 A.2d at 775. Truckers rely on *Sessoms* for the general proposition that the Legislature must set limits on an agency's power, then contend that the APCA violates the nondelegation doctrine because the statute delegates unfettered power. Pet. Br. 39. However, the APCA does not delegate unfettered power, as explained above. The APCA circumscribes EQB's authority. *See* Section V.B, *supra*.

So, neither of the cases cited by Truckers support their unlawful delegation claim. Consequently, that claim should be rejected.

VI. Reply to Response to Preliminary Objection No. 6: Truckers Distort the Clean Air Act Waiver and Opt-In Requirements and the APCA

Truckers incorrectly argue that the Warranty Requirement and the Emissions Amendment under the PA HDD Regulation are new rules and Agencies must revert to the federal HDD regulation until they promulgate a new rulemaking. Pet. Br. 44, 45. Truckers also repeat their claim that the incorporation by reference of amendments to the California HDD Regulation unlawfully circumvents Pennsylvania procedural requirements and denies Pennsylvanians the opportunity to engage in the rulemaking process. *Id*. at 45.

These arguments are addressed in Agencies' opening brief and above. First, Agencies followed all Pennsylvania procedural requirements when the PA HDD Regulation was adopted. Resp. Br. 51-54 and 32 Pa. B. 2327, 2333.

Second, as explained in the opening brief and above, Agencies are not required to pursue a new rulemaking every time California updates its HDD regulation—state and federal law require that any state that opts to use the California vehicle emission program must maintain an identical program. Resp. Br. 35-36, 52-54; Section IV, *supra*.

Even assuming, for the sake of argument, that a state could switch between the California HDD Regulation and the federal HDD Regulation whenever California revises its regulation, the result would be confusion and chaos in the motor vehicle community. Such confusion and chaos would be inconsistent with

the CAA, the APCA, and good government. The initial 2002 rulemaking adopted an HDD *program* to ensure consistency with the California HDD *program.* Specific static regulations were not adopted, but the *program* which changes from time to time was adopted. *See, e.g.,* 25 Pa. Code § 126.501.

Truckers argue that nothing in the CAA mandates that Pennsylvania must remain tied to the California HDD Regulation in perpetuity. But Truckers miss the point. Agencies purposefully chose to exercise discretion to incorporate by reference the California HDD Regulation to assure consistency with the APCA and CAA in 2002 to achieve and maintain the NAAQS. Switching back and forth between the federal regulation and California regulation would not advance either of these goals.

Finally, Truckers cite *Auto. Serv. Councils of Pennsylvania v. Larson*, 474 A.2d 404, 406 (Pa. Cmwlth. 1984) to support their argument. However, this case is inapposite. *Larson* involved an agency's failure to comply with the public notice and comment procedure required by state law for proposed rulemakings. The instant matter does not concern a proposed rulemaking. The PA HDD Regulation adopted California's program, to allow for automatic incorporation of amendments as required by the CAA and APCA. *See* Resp. Br. 35-36, 52-54; Section IV, *supra*.

Thus, Truckers' argument that Pennsylvania reverts to federal HDD regulation whenever the California HDD Regulation is amended is unsupported under the law, unworkable in practice, and must be rejected.

CONCLUSION

The foregoing shows that Truckers have advanced no legal arguments to defeat Agencies' Preliminary Objections.

WHEREFORE, the Commonwealth of Pennsylvania, Department of Environmental Protection, and the Environmental Quality Board respectfully request that this Honorable Court grant their Preliminary Objections, and that Truckers' Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief be dismissed in its entirety with prejudice.

/s/ Jesse Walker
Jesse Walker
Assistant Counsel
Department of Environmental Protection
Attorney ID No. 317750

/s/ Robert A. Reiley
Robert A. Reiley
Counsel
Environmental Quality Board
Attorney ID No. 61319

Office of Chief Counsel
400 Market Street, 9th Floor
P.O. Box 8464
Harrisburg, PA 17105-8464

DATE: December 21, 2023

CERTIFICATION OF WORD COUNT

I certify as required by Pa.R.A.P. 2135(a) that the forgoing brief contains 6,982 words in compliance with the length of brief requirement.

Respectfully submitted,

FOR THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION:

/s/ Jesse C. Walker
JESSE C. WALKER
Assistant Counsel
Attorney ID No. 317750
Department of Environmental Protection
400 Market Street, 9th Floor
P.O. Box 8464
Harrisburg, PA 17105-8464
(717)-787-0455
jeswalker@pa.gov

ROBERT A. REILEY
Attorney ID No. 61319
Counsel
Environmental Quality Board
Office of Chief Counsel
400 Market Street, 9th Floor
P.O. Box 8464
Harrisburg, PA 17105-8464
(717)-787-0478
rreiley@pa.gov

Dated: December 21, 2023

CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

FOR THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION:

/s/ Jesse C. Walker
JESSE C. WALKER
Assistant Counsel
Attorney ID No. 317750
Department of Environmental Protection
400 Market Street, 9th Floor
P.O. Box 8464
Harrisburg, PA 17105-8464
(717)-787-0455
jeswalker@pa.gov

ROBERT A. REILEY
Attorney ID No. 61319
Counsel
Environmental Quality Board
Office of Chief Counsel
400 Market Street, 9th Floor
P.O. Box 8464
Harrisburg, PA 17105-8464
(717)-787-0478
rreiley@pa.gov

Dated: December 21, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of December 2023, I electronically filed the foregoing document with the Clerk of the Court via the CM/ECF system, which will cause a copy to be served upon counsel of record.

Respectfully submitted,

FOR THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION:

/s/ Jesse C. Walker
JESSE C. WALKER
Assistant Counsel
Attorney ID No. 317750
Department of Environmental Protection
400 Market Street, 9th Floor
P.O. Box 8464
Harrisburg, PA 17105-8464
(717)-787-0455
jeswalker@pa.gov

ROBERT A. REILEY
Attorney ID No. 61319
Counsel
Environmental Quality Board
Office of Chief Counsel
400 Market Street, 9th Floor
P.O. Box 8464
Harrisburg, PA 17105-8464
(717)-787-0478
rreiley@pa.gov

Dated: December 21, 2023

APPENDIX

AMERICAN TRUCKING ASSOCIATIONS
950 N. Glebe Road ★ Suite 210 ★ Arlington, VA ★ 22203-4181
www.trucking.org

June 25, 2018

California Air Resources Board
1001 I Street
Sacramento CA 95814

Re: Proposed Amendments to California Emission Control System Warranty Regulations and Maintenance Provisions for 2022 and Subsequent Model Year On-Road Heavy-Duty Diesel Vehicles and Heavy-Duty Engines with Gross Vehicle Weight Ratings Greater Than 14,000 Pounds and Heavy-Duty Diesel Engines in such Vehicles

(Submitted Electronically: http://www.arb.ca.gov/lispub/comm/bclist.php)

Dear Chair Nichols and Members of the Board:

The American Trucking Associations (ATA) appreciate the opportunity to comment on the California Air Resources Board's Proposed Amendments to California Emission Control System Warranty Regulations and Maintenance Provisions posted on May 8, 2018. ATA is the national trade association that represents the U.S. trucking industry and is a united federation of motor carriers, 50 state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry.

ATA member companies purchase trucks throughout the United States and are sensitive to increases in equipment and maintenance costs. Specific to California, some fleets have had to change their business models to satisfy the requirements of the Truck and Bus Rule. This has accelerated fleet turnover while also increasing debt loads and maintenance costs. The next compliance milestone for this rule will occur in 2023 when trucks which were purchased to meet the initial compliance requirements will need to be replaced with newer trucks. In addition, the Board's planned low-NOx emissions standard is scheduled to be implemented at nearly the same time. Due to the alignment of these regulations with these proposed amendments, capital costs associated with new truck purchases in California will be uniquely affected and result in impacts that have not been addressed in the analysis. ***We ask the Board to reevaluate the costs involved with this proposal and/or consider an alternative approach which incentivizes the additional cost of the extended warranty coverage.***

(1) Discrepancies exist between survey costs and the costs projections used in the ISOR.

Some of the key findings of the Institute for Social Research (ISR) survey are (ISOR, Appendix H, p. vii):

- Of those that have an extended warranty, more than half, (55%) say their extended warranty package cost them over $2,500.
- Owner/operators indicated that the average cost of repairs over a range of 508,000 miles was $4,177 per vehicle (for vehicles needing repairs). *(emphasis added)*

In contrast, the Initial Statement of Reasons (ISOR) attributes the following finding to the ISR survey (ISOR, p. III-20).

- Owner/operators indicated that the average cost of repairs per vehicle was $2,131 per vehicle, while the average current mileage was 508,000 miles. The repair cost is similar to that deduced from CARB's warranty data… *(emphasis added)*

Finally, Table IX-8 of the ISOR projects the increased costs passed onto vehicle purchasers due to the proposed amendments on a per-vehicle basis to range from $149 to $633.

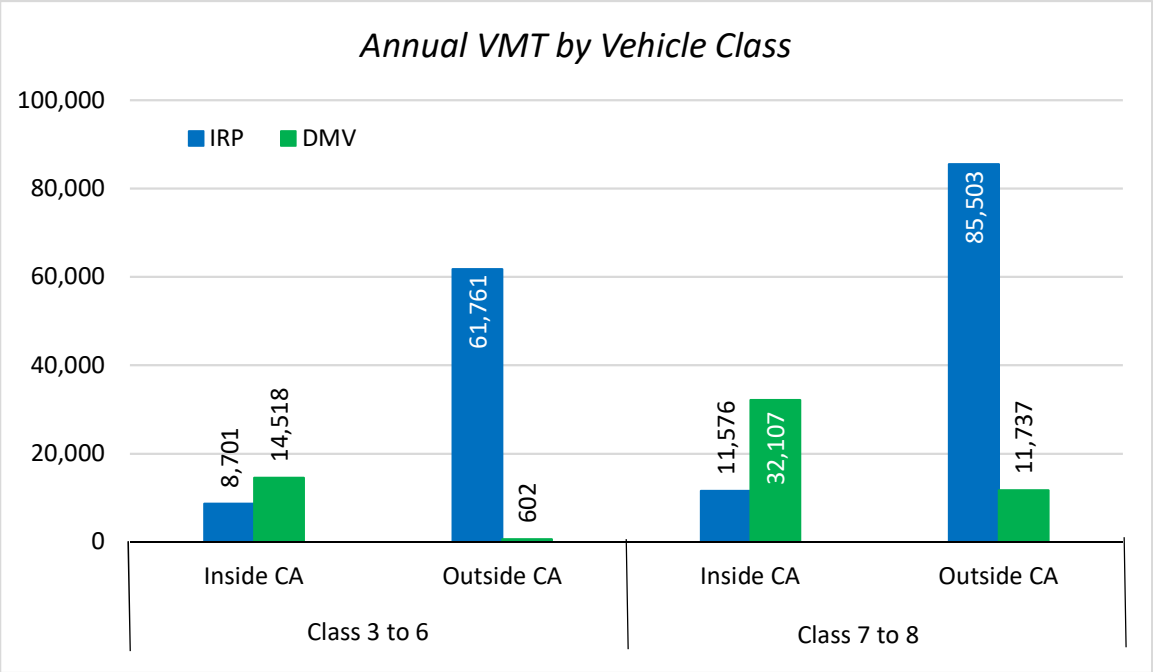
These statements indicate that companies currently purchase extended warranties for several thousand dollars and, by enacting these amendments, companies will now receive extended warranty coverage for a few hundred dollars. It is difficult to reconcile these numbers. The trucking industry is concerned the amendments will add thousands of dollars to new truck purchases for those who currently do not purchase extended warranties and also increase the cost of existing extended warranties as a result of manufacturers having to process claims across a larger population of affected vehicles.

2) Decreased or shifted purchases as a result of the additional warranty cost are not addressed.

The ISOR estimates annual statewide capital costs increases from extending the minimum warranty period will range from $1.3 to $12.3 million (ISOR C-19 to C-20), although, as discussed above, costs may be higher. Either way, this will amount to several thousands of dollars per truck for a company that currently does not purchase an extended warranty. Given the economics of supply and demand, this increase in cost is expected to decrease demand, resulting in an overall decrease in new truck purchases or a shift of purchases to less expensive options outside the state (not to mentioned situations where warranties will be voided). In either case, the purported benefits from the proposed amendments will be less. The ISOR's cost-benefit analysis does not account for the economic or environmental impacts associated with decreased or shifting purchases as a result of the proposed amendments.

3) Mileage accumulation rates need to be reexamined prior to adoption.

At the most recent annual Transportation Research Board meeting, a poster titled, *Preliminary Findings from the California Vehicle Inventory and Use Survey (CA-VIUS)*, presented the following data.



Source: Cambridge Systematics, *Preliminary Findings from the California Vehicle Inventory Survey (18-02215) - B437*, Transportation Research Board Annual Meeting, Poster Session 256: Truck Efficiency: Routing, Platooning, Energy Consumption, and Safety (2018).

As illustrated by this initial data, Class 7 to 8 California-registered trucks (listed as "DMV") average roughly 45,000 miles annually. This is more than one-third fewer annual miles than the projections used by EMFAC to develop the proposed amendments (ISOR, C-12 to C-13). As California-registered trucks will be most affected by this proposal, incorrect mileage assumptions can lead to new truck buyers having to pay for a level of warranty protection they do not require.

The difference between the CA-VIUS data and EMFAC estimates raises questions about the mileage accumulations which were used. For example, the CA-VIUS Class 7 to 8 IRP data aligns more closely with the EMFAC mileage estimates; however, the majority of this mileage is traveled outside the state, which would decrease the presumed benefits of the proposed amendments. This discrepancy between data sources should be further evaluated prior to adoption to ensure an accurate characterization of the affected truck population.

4) An incentive-based approach should be used to reduce potential economic impacts.

The ISOR indicates one of the benefits of the proposed amendments is to protect heavy-duty vehicle owners from having to pay for future repair costs resulting from recent changes to the state's Heavy-Duty Inspection Programs (ISOR, III-5). In other words, the extended warranty amendments, while increasing the cost of new truck purchases, will serve as an insurance policy

against future costs. With approximately 40+ percent of the heavy-duty vehicle population already meeting the requirements of these proposed amendments (ISOR III-6), an alternative option would be for the state to offset the cost of the extended warranty with a voluntary program directed at the state's new truck buyers. This approach could use incentive funding to encourage buyers to avoid future costs associated with maintenance. This would not only help reduce some of the adverse economic impacts for new truck buyers but would also support the state's truck dealership network; while allowing the state to continue to reduce emissions. The state has a long history of using incentive-based approaches to advance emission reductions and, given the purported cost-effectiveness of the proposed amendments, should consider the use of incentives as a practical alternative.

ATA appreciates the Board's thoughtful consideration of these comments.

Sincerely,

Michael Tunnell
Director, Energy & Environmental Affairs
American Trucking Associations