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February 22, 2006

VIA HAND DELIVERY

Robert Doyle
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U.S. EPA
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Re: Comments of the ATA on CARB's CAA Sec. 209(e)(2) Authorization Request for its TRU Regulation, 70 Fed. Reg. 70075 (Nov. 21, 2005); 71 Fed. Reg. 3292 (Jan. 20, 2006) - Docket ID: OAR-2005-0123

Dear Mr. Doyle,

Please find attached the comments of the American Trucking Associations, Inc. ("ATA") on the California Air Resource Board's ("CARB's") Clean Air Act Section 209(e)(2) authorization request for its Transport Refrigeration Unit Regulation, Docket ID: OAR-2005-0123. I have also enclosed a copy of the exhibits referenced in the comments.

Thank you for your attention to this matter. Please feel to contact me at (202) 789-6026 should you have any questions regarding this submission.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Richichi".

Thomas Richichi

Enclosure

Before the
United States Environmental Protection Agency

Comments of
AMERICAN TRUCKING ASSOCIATIONS, INC.



Driving Trucking's Success

on the
**California Air Resources Board's
Clean Air Act Section 209(e)(2) Authorization Request for its
Transport Refrigeration Unit Regulation**

70 Federal Register 70075 (November 21, 2005);
71 Federal Register 3292 (January 20, 2006)

Docket No. OAR-2005-0123

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I. INTRODUCTION

The American Trucking Associations, Inc. (“ATA”) respectfully submits the following comments on the California Air Resources Board’s (“ARB’s”) request that the U.S. Environmental Protection Agency (“EPA” or “the Agency”) authorize ARB’s Transport Refrigeration Unit (“TRU”) Regulation pursuant to Clean Air Act (“CAA”) Section 209(e)(2). That regulation is of particular concern to the national trucking industry because, as demonstrated in these comments and supporting materials, over the life of the rule, it will impose an engine retrofit or replacement requirement on as many as 340,000 TRU-equipped tractor-trailers based outside of California.

A. American Trucking Associations, Inc.

ATA is the national trade association of the trucking industry. It is an association comprised of motor carriers, state trucking associations and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes more than 3,700 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA encompasses over 34,000 companies and every type and class of motor carrier operation in the United States, effectively representing every segment of the trucking industry in the United States.

Significantly, the industry is composed of both large national enterprises as well as a host of small businesses, all of whom operate in an extremely competitive business environment, with narrow profit margins. According to the Department of Transportation, over 95% of the nation’s motor carriers (nearly 565,000 in number) have 20 or fewer trucks. For those carriers in particular, their livelihood can be dramatically impacted by new regulatory requirements that are imposed broadly on existing equipment, as in the case of the TRU Regulation.

In its capacity as a representative of the trucking industry, ATA regularly comments on matters affecting the national trucking industry's common interests, providing its expertise and understanding of the industry to help avoid the approval of unreasonable, inappropriate and/or unduly burdensome regulatory requirements. To that end, it offers these comments on ARB's authorization request.

B. Overview of the Trucking Industry in the United States

As is more fully explained in these comments, the TRU Regulation is problematic in numerous respects, legal and practical, because (among other reasons) it effectively extends the reach of California's engine emission regulations far beyond the state's borders without meaningful limits, sweeping up much of the national trucking industry in the process. To place the problematic reach of the TRU Regulation in proper perspective, it is important to understand the nature and scope of the trucking industry in the United States.

The trucking industry is a major force in the national economy,¹ employing more than 8.6 million people in jobs that directly relate to trucking.² Trucking accounts for 88 cents of every dollar collected for freight transportation in the U.S., and trucking hauls practically every type and kind of product and raw material used in the manufacturing and retail sectors of the economy, including temperature sensitive loads of all kinds.

As the principal conduit of freight transportation in the United States, the trucking industry is critical to the daily welfare of the average citizen as well as the overall economic

¹ The importance of the trucking industry to the nation's economic well-being has been documented previously in the context of EPA's September 16, 1997 Regulatory Impact Analysis accompanying the final rule establishing emissions standards for Heavy Duty Engines. *See* Controll of Emissions of Air Pollution from Highway Heavy-Duty Engines, 62 Fed. Reg. 54694 (October 21, 1997).

² American Trucking Trends: The Essential Guide to Trucking Facts and Figures (2005).

well-being of the country. Given its predominant role as the transportation mode by which U.S. business and consumers receive virtually all of their goods, the trucking industry ensures the availability and cost effective distribution of consumables, finished goods and raw materials throughout all segments of the economy. Indeed, over 80 percent of all communities in the United States rely *exclusively* on trucks to deliver all of their food, fuel, clothing, medicine, and every other type of consumer goods. In sum, the nation's trucking industry provides the essential transportation resources, infrastructure and services that are necessary to sustain a growing economy and deliver the goods and services essential to almost every American business and individual.

The trucking industry that makes this possible operates in an extremely competitive business environment, where economic survival is premised on the ability to promptly and efficiently direct resources and equipment to meet consumer and business demands as they arise throughout the country. In response to the demands of the national economy, the business model of the industry has evolved in recent years such that trucking companies move trailers and their loads ever more seamlessly over the Interstate Highway System from destination to destination across the country in an uninterrupted flow of commerce. Within that business model, the application of equipment utilization strategies intended to optimize hauling operations has become the lifeblood of the trucking industry. In particular, it has become an absolute necessity that motor carriers make every effort to minimize non-revenue or "deadhead" miles and distances between load drop-offs and subsequent freight pick-ups in order to compete effectively and survive economically in the market.

Consistent with this, the overwhelming majority of motor carriers operate on an "on-call" basis, with trucks ready to move from one destination to the location of the next available load,

no matter where it may be. Moreover, with the growth of wireless and internet communications, computer software and navigational technology such as GPS, the sequence of picking up loads, delivering them to a destination and acquiring a new load as the opportunity presents itself, has become a continuous process that criss-crosses the country, with drivers moving in a chain of individual trips involving a series of discrete, one-way contracts of carriage from one point to the next that continue commonly for periods of up to two to four weeks.

Within this chain of trips, it is usually the case that the location and sequence of the trip segments comprising the chain are not known to the company or the driver (and cannot be determined) at the time the trip chain begins. Indeed, it is rarely the case that dispatchers know prior to the completion of an individual trip segment where a driver and his next load will ultimately be routed, although it is very common for that next trip segment to move the load hundreds of miles across the country. In this regard, it is commonplace for the *average* trip segment of a vehicle owned by a large trucking company hauling a load to be as much as 1400 miles.³

³ This phenomenon is explained in the context of actual operational scenarios later in these comments and in the attached Declarations of Corey England, Jon Cramer, and the Statement of David Hedgpeth for Frozen Food Express Industries, Inc., as well as in testimony from EPA's January 23, 2006 hearing. (attached hereto as Exh. A, B, C and D). Mr. England, a senior executive of a large national motor carrier company, familiar with industry practices, provided a real world example illustrative of the chain of trips that are typically involved in refrigerated transport operations. That example saw a TRU-equipped trailer begin its journey at a customer facility in Redlands, California, then proceed on in an uninterrupted sequence of drop-offs and pick-ups that went from Redlands to Portland Oregon, to Boardman, Oregon, to Concord, North Carolina, to Claremont, North Carolina, to Springvale, Utah, to Melrose Park, Illinois. See England Declaration at ¶ 5 (Exh. A). Such trip chains may begin in virtually any state, without the possibility of knowing in advance whether the trip will lead to, from, or through California. As is more fully explained in these comments, while it is not practically or economically possible to confine the use of a TRU trailer to California where it may spend but a fraction of its time, the owner would nonetheless have no choice but to retrofit or replace the engine to meet California emissions standards.

As a corollary of the industry practice of continuously dispatching trailers to the next load of opportunity and associated length of that ensuing trip, it is a given that equipment must be legally eligible to operate anywhere in the company's service area in order for a motor carrier company to compete in the marketplace. For most long-haul trucking concerns that operate TRUs, that service area is usually the entire country or, at a minimum, a major geographic division of the country (*i.e.*, the Western or Eastern United States). Unfortunately, either by oversight or design, ARB has failed to acknowledge and address this fundamental operational and economic consideration in crafting the TRU Regulation for which it now seeks authorization. The problematic consequences of that failure (among others) are described in detail in these comments.

II. SUMMARY OF COMMENTS

California's "Airborne Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Units (TRUs) and TRU Generator Sets, and Facilities Where TRUs Operate" ("TRU Rule" or "Rule") is an unprecedented rulemaking, both in terms of its scope and its legal effect. Despite ARB's suggestion to the contrary, the TRU Rule raises a number of authorization issues not previously addressed by EPA or the courts in the context of CAA Act Section 209(e)(2).

First, and most significantly, its regulatory requirements fall primarily upon in-use engines located *outside* of California. Unlike stationary source engines or nonroad portable engines (*e.g.*, lawn equipment) whose nature and use confine them to limited geographic areas within California, TRUs move throughout the country as part of a tractor-trailer tandem on the very same routes and to the same destinations that are served by the national long-haul truck fleet that transport the hundreds of thousands of refrigerated trailers affected by this rule. Second, because the operation of most TRUs cannot be confined to California, but instead necessarily

move in the free flow of commerce between states, the California retrofit/replacement requirements will effectively create a new *national* emissions standard for TRUs in direct contravention of the intent of the Clean Air Act, including Section 209. Third, because the Rule's reach beyond California is effectively unrestrained, it will impose burdens and enforcement consequences on engine owners throughout the country who had no reason to suspect that they were being swept up wholesale into a California regulatory regime. Fourth, while it could have done so, ARB has not made any meaningful effort to limit the Rule to engines used principally in California. Rather, it would require the retrofit (or replacement) of any non-California equipment used in the transport of temperature controlled goods on the national highway system, if for any reason it had occasion to be operated in California, however limited or *de minimis* that contact with the state. Over the life of the Rule, as demonstrated in these comments, this will affect as many as 340,000 out-of-state engines. Fifth, as explained in these comments, the TRU Rule relies heavily on the imposition of "technology-forcing" retrofit requirements on engine *users*, rather than manufacturers -- a situation not contemplated under the Clean Air Act and one not previously addressed in any authorization request. Finally, the TRU Rule relies heavily on forcing operators to scrap and replace existing engines, because the requisite retrofit technology will not be available, particularly for the pre-2002 model year engines that will face the earliest compliance deadlines.

EPA has never before been asked to consider a waiver or authorization request for a rule of this reach, and the problematic issues, legal and practical, that are raised by the TRU Rule have not previously been addressed by EPA or the courts. Those issues are summarized below and addressed in detail in these comments.

A. **The Impact of TRU Rule would Fall Most Significantly on Out-of-State Engines**

Unlike previous ARB regulations affecting “in use” engines, the TRU Rule’s principal impacts are not “inherently local in nature,” but rather extend to engine users *outside California*. Among other things, starting at the end of 2008, the TRU Rule would require that existing TRUs that enter and operate in California, however limited that event, must either: (1) be retrofitted with emissions reduction equipment, the technology for which does not currently exist, or (2) be replaced with a new engine. Additionally, unlike prior rulemakings, its impacts are not confined to manufacturers who must concern themselves only with producing *new* engines for *future* sale in California and have the means at their disposal to do so. Rather the TRU Rule imposes engine emissions reduction requirements on the *users* of any *existing* TRU in the country that has the potential to be operated in California, however limited the engine owner’s financial and technical resources or its actual operations in that state.

Given the realities of modern truck fleet management in the United States, and the economic necessity that most TRU trailers be eligible and available on short notice to service deliveries *throughout* the country, the number of vehicles affected outside California that will be captured by the TRU is far greater than the number that are registered or operate primarily within the state, and many times the number proffered by ARB. In fact, the rule will impact more than 340,000 TRU engines outside of California. EPA has never before considered a request for a CAA Section 209 authorization of such expansive reach. Moreover, should EPA authorize a rule with such enormous out-of-state impacts, it would effectively be “approving” California’s authority to create a *de facto* national standard for TRU retrofits in direct contravention of the statutory scheme envisioned by Congress under Section 209 of the CAA.

Notwithstanding the unprecedented impact on refrigerated truck trailers that the TRU Rule will have nationwide, the rulemaking record reveals that ARB has made no meaningful

attempt to address and limit the extent of the out-of-state impacts of the rule. As is more fully explained and documented hereafter in these comments, ARB estimated that about 30,300 TRU semi trailers operated in California each day -- of which 22,800 are based in California and 7,500 are based out-of-state.⁴

In considering the *cost burdens* of the rule, ARB then assumed that it was the very *same* 7,500 out-of-state TRU trucks that would be entering California every day, 365 days of the year, year-in and year-out. The assumption is absurd on its face and wholly inappropriate as a methodology for estimating the costs and out-of-state impacts of the rule. Indeed, ARB staff tacitly admitted that the assumption was unfounded at the ARB hearing on the Rule, yet ARB made no effort to correct this irrational assumption and to develop in its place an appropriate methodology to identify the actual universe of affected out-of-state engines and address the true costs of the Rule associated with non-California TRUs.

To give some scope to the magnitude of this error, testimony and data presented with these comments indicates that the actual number of out-of-state engines captured by the Rule over its lifetime will be nearly 30 times greater than ARB assumed -- that is, about 340,000 out-of-state refrigerated trailers, or 75% of the total TRUs based outside California, that would need to be retrofitted or scrapped and replaced with new equipment during the life of the Rule at a total cost (based on *California's* per engine cost assumptions) of between \$775 million and \$1.4 billion.

⁴ ARB used a baseline year of 2000 to generate these figures, then applied the same figures over the life of the Rule, adjusting marginally for the expected growth of the overall national fleet.

B. Significant Numbers of Out-of-State TRU Operators Impacted by the TRU Rule were Effectively Denied Notice and an Opportunity to be Heard

As a result of ARB's *de facto* attempt to regulate existing TRUs outside its borders, out-of-state TRU operators who will be substantially affected by California's TRU Rule were deprived of adequate notice and opportunity to be heard regarding the ARB rulemaking. Unaware of California's intent to expand its regulatory reach beyond its borders, tens of thousand of motor carriers who operate TRUs used primarily outside California, many of whom are small trucking companies, were not provided notice of California's intent to effectively regulate engines outside its borders, yet they would be required, under penalty of law, to convert or replace their equipment upon entering the state. Thus, for most of those out-of-state engine owners, the first notice of California's Rule was EPA's November 21, 2005, Federal Register Notice announcing the consideration of ARB's request for authorization. *See* California State Nonroad Engine Vehicle Pollution Control Standards, Opportunity for Public Hearing and Request for Public Comment, 70 Fed. Reg. 70075 (Nov. 21, 2005).

From an enforcement perspective, California's expansive rulemaking is even more problematic. Should the TRU Rule be authorized, for thousands of motor carriers their first notice of the rule may be an enforcement action by ARB after they enter California with TRU equipment that satisfies the requirements of every other state and the federal government - but not California's.

C. The TRU Rule would Impose a "Technology-Forcing" Retrofit Requirement on Operators, Instead of on Engine Manufacturers

In adopting the Clean Air Act, Congress contemplated certain circumstances under which it would permit "technology forcing" regulations, but only (1) with respect to engine manufacturers, and (2) subject to adequate lead-time with appropriate consideration of costs. In adopting the TRU Rule, ARB has gone well beyond the intent of the CAA, seeking to achieve

compliance by imposing “technology forcing” retrofit requirements on owners and operators, forcing them to rely on third-party engine manufacturers who may be unwilling and uninterested in investing the resources necessary to develop verified retrofits for existing TRUs. Unlike other technology forcing provisions deemed appropriate under the CAA, the TRU Rule imposes no sanctions on manufacturers, through nonconformance penalties or otherwise, to ensure that the requisite retrofit technology will be pursued by them and become available.

Indeed, the TRU Rule’s significant reliance on engine scrappage and replacement as a compliance strategy has the effect of discouraging the retrofit technology innovation by manufacturers that would be necessary for operators (and EPA) to have adequate assurance that technically feasible emissions control equipment will become available. Under the TRU Rule, manufacturers are given every incentive not to develop the requisite technology in order to be able to sell more new engines to owner/operators. The Clean Air Act does not contemplate “technology forcing” mandates of this nature, nor that such requirements may be imposed on users, rather than manufacturers.

D. ARB Has Not Given Appropriate Consideration to Issues of Technical Feasibility, Lead-Time, and Costs

Although the TRU Rule is ostensibly written to allow compliance through installation of a verified retrofit, instead of through engine replacement, ARB has all but admitted that no such retrofits exist. None existed when ARB proposed the rule in 2003, and today, nearly three years later, ARB has yet to demonstrate progress toward a verified retrofit sufficient to support the assumption that such retrofits will be available by the end of 2008 to permit compliance with the Rule.

In this regard, ARB’s assumption that the requisite emissions reduction technology will become available for pre-2002 model year engines is directly at odds with the conclusion

reached by EPA in its June 29, 2004 nonroad rule that such technology was problematic from a feasibility perspective due to the lack of electronic fuel ignitions in those model year engines. Control of Emissions of Air Pollution From Nonroad Diesel Engines and Fuel, 69 Fed. Reg. 38958 (June 29, 2004). Moreover, the record reveals that ARB has failed to make any determination with respect to the amount of lead-time that it believes would be reasonably required to develop technically feasible retrofits for TRUs, taking cost appropriately into account.

Quite to the contrary, ARB has conceded that retrofits may very well not be available for purposes of compliance with the Rule, and that even engine replacement may be the only compliance option available for model years prior to 2002 (a view supported by EPA's own analysis of feasibility in its June 2004 Nonroad Engine Rule). ARB was nonetheless emphatic that it would *not* seek to amend the TRU Rule, even if purported "technology reviews" planned by ARB reveal that no retrofits will be available. For these reasons alone the Rule must be considered to fail the CAA Section 209(e) and 202(a) authorization requirements.

E. **The Flawed TRU Rule is the Product of ARB's Continued Questioning of the Need for EPA Authorization and the Applicability of Federal Authorization Standards**

While California has paid lip service to the authorization requirement and consistency criteria imposed by CAA Sections 209(e) and 202 in its request to EPA, ARB has persisted in taking the position throughout the TRU Rule that its "in-use" regulations do not need EPA's authorization, and that established federal Clean Air Act authorization criteria such as lead-time are "irrelevant" and do not apply to California standards for used engines. ARB's views explain many of the deficiencies in its authorization request and rulemaking findings under the federal Clean Air Act, and EPA should pay particularly close attention to ARB's application in light of

the role that ARB's failure to fully and unreservedly recognize the applicability of the federal Clean Air Act requirements has played in fashioning the TRU Rule.

F. Authorization of the TRU Rule is "Otherwise Not in Accordance with the Law"

ARB has suggested that any review of its TRU Rule must be confined to a cursory review of the three statutory criteria set forth in CAA Section 209(e)(2)(A)(i)-(iii). However, while those three criteria should ordinarily be the focus of EPA review of an authorization request, the Agency's review should not be so constrained as to ignore the requirements of the Administrative Procedure Act with respect to final agency action, nor to purport to authorize a regulation that is "not otherwise in accordance with law." In this regard, not only does the TRU Rule effectively create a national emissions standard in contravention of the plain meaning and intent of the statutory scheme of the CAA and Section 209(e) in particular, but the provisions of the Rule are not otherwise in accordance with law in several respects. These include (1) the failure to articulate a rational standard for the enforcement of the rule in contravention of the due process requirements of the Administrative Procedure Act, (2) the Rule's conflict with CAA Section 202(b)(1)(C) regarding standards for pre-model year 2004 trucks, (3) the inconsistency of the Rule with California Health and Safety Code Section 43600, and (4) violation of the Commerce Clause.

III. ANALYSIS

EPA should deny authorization for the TRU Rule, or alternatively remand to ARB for an appropriate evaluation of the out-of-state impacts of the rule and determinations of technical feasibility, cost, and lead-time consistent with CAA Sections 209(e)(2) and 202(a).

A. **The TRU Rule Imposes Legally Impermissible and Burdensome Out-of-State Engine Emissions Requirements, which California Failed Appropriately to Consider in its Rulemaking, and Would Result in a *De Facto* National Standard**

1. **Clean Air Act Section 209(e)(2)(B) Evinces a Congressional Intent to Foreclose California Regulations that Reach beyond its Borders and Impose Requirements on Significant Numbers of Engines Outside of the State**

The plain meaning of Section 209, the associated statutory scheme and the relevant caselaw foreclose EPA from granting ARB's authorization request. Significantly, the principal impact of the Rule will fall outside of California and, as the D.C. Circuit has explained "*unless a particular state chooses to adopt California's standards, the [engines] within its boundaries will be governed by and will meet federal standards.*" *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1302 n.59 (D.C. Cir. 1979) (emphasis added).

ARB's request for authorization fails for the same reason expressed by the Court in the *Ford Motor* case, *i.e.*, because ARB's "reading of Section 209(b)(3) is at odds with the congressional decision to include in the revised Act a new [statutory provision] permitting states with ambient air problems *to choose* to enforce the California emissions standards rather than the federal ones. . . . Had Congress provided for and fully anticipated the nationwide distribution of California [engines]⁵ . . . it is inconceivable that it would have also added a section that permits individual states *to elect* to enforce California standards. On the contrary, [the CAA] clearly presupposes *that unless a particular state chooses to adopt California's standards, the [engines] within its boundaries will be governed by and will meet federal standards.*" *Id.* at 1302 n.59 (emphasis added).⁶

⁵ The language of the opinion references vehicles, but the CAA would view vehicles and their engines as one and the same for these purposes.

⁶ Federal standards do not impose requirements on in-use engines.

As explained below, by mandating, *without exception*, that any refrigerated van or trailer that enters California must be retrofitted or replaced, the TRU Rule would establish engine emissions requirements for significant numbers of TRU engines in other states and effectively impose a national standard. As such, the Rule cannot be reconciled with either (1) the statutory scheme set forth in CAA Section 209 that leaves to the individual states the decision whether to adopt and enforce California engine emissions requirements or (2) the related interpretation of Section 209 set forth by the D.C. Circuit in the *Ford Motor* decision.⁷ EPA may not grant authorization to any California nonroad standard that is “not consistent with” Section 209. *See* 42 U.S.C. § 7543(e)(2)(A)(iii). Because the statutory “opt-in” scheme of the Clean Air Act is set forth in Section 209, and because (as discussed herein) the TRU Rule is “not consistent with” that scheme, the Rule fails under the express language of the third criterion of CAA Section 209(e)(2)(A) and cannot be authorized by EPA.

Moreover, it is also worth noting in this regard that ARB appears to argue that the only relevant inquiry in this proceeding is whether ARB has made sufficient findings with respect to the three criteria set forth in CAA Section 209(e)(2)(A). In these comments and the supporting record materials, ATA has clearly demonstrated (1) that ARB’s “findings” are not sufficient to sustain ARB’s claim to have met the second and third of those criteria, and (2) that even if ARB had made adequate findings, the evidence accompanying these comments and the January 23, 2006 Hearing Testimony would refute them. In addition, however, ATA takes issue with ARB’s suggestion that EPA’s authority to review the TRU Rule should not also consider whether the

⁷ Though not a perfect analogy (but an instructive one), under the CAA, California could not mandate that all out-of-state automobiles that might ever have occasion to operate in the state for any period of time would be required to install engine retrofits or replace their engines to become “California compliant” (as distinguished from California’s authority to impose in-use restrictions of an inherently local nature, such as speed limits).

Rule conflicts with provisions of the CAA other than those cited by ARB, or the overall statutory scheme of the Clean Air Act.

While EPA may not be required to consider the antitrust or constitutional considerations that might be presented by an authorization request from ARB, *Motor and Equipment Ass'n*, 627 F.2d at 1114, the Agency cannot legally authorize an ARB emissions regulation that is otherwise inconsistent with the Clean Air Act itself. To suggest otherwise would stand the language and intent of the CAA on its head and place the Agency in the position of formally disregarding the very statute it is charged with interpreting and enforcing. Moreover, setting such a precedent would open the door to other, more expansive ARB engine emissions regulations, without regard for their consistency with the CAA.

The significance of this is readily apparent in the similarly expansive authorization request that ARB submitted to EPA on December 21, 2005 seeking Section 209(b) authorization for its Greenhouse Gas Rulemaking. Using the same unsupportable arguments advanced here, ARB has asserted in that rulemaking that EPA may not consider whether ARB has adopted engine emissions standards inconsistent with the remainder of the CAA, as long as ARB makes plausible factual findings under Section 209(b)(1)(A)-(C), the onroad provision of Section 209 that corresponds to Section 209(e)(2)(A). *See* Letter from Catherine Witherspoon, Executive Officer, ARB to Stephen L. Johnson (Dec. 21, 2005) (“Greenhouse Gas Control Application”); CAA Section 209(b) Request, California’s Motor Vehicle Regulations to Control Greenhouse Gas Emissions, Attachment 2 (December 21, 2005) at 9-10. The letter and supporting document are attached hereto as Exh. E.

Despite ARB’s suggestion to the contrary, EPA is not precluded from applying the CAA statutory scheme to evaluate the propriety of an ARB authorization request, nor is it allowed to

write out of the statute provisions of the CAA that are in direct conflict with an ARB Rule in deference to ARB "findings" under Section 209.

2. ARB has Grossly Understated the Number of Non-California TRUs that would be Subjected to the Rule and Require Conversions

ARB's methodology for determining the engine population affected by the TRU Rule flows from its estimate that 36,800 TRUs associated with semi-trailers or truck-vans operated in California in 2000. Of these, ARB estimated that approximately 30,300⁸ were semi-trailers with 25-50 hp TRUs, and the remaining 6,500 were truck vans with TRUs below 25 hp.⁹ See ARB's Revised Staff Report: Initial Statement of Reasons for Proposed Rulemaking, ATCM for In-Use Diesel-Fueled TRUs and TRU Generator Sets, and Facilities where TRUs Operate ("ISOR") (October 28, 2003), at V-1, V-2, attached hereto as Exh. G. As noted previously, of the 30,300 TRU semi-trailers ARB estimated operate in California on any given day, ARB further concluded that 7,500 were based out-of-state.

The fatal flaw in ARB's methodology, however, is that ARB assumed, in estimating the costs of the rule, that the out-of-state TRU population operating in California would remain fixed at all times, and that there would be a completely static universe of individual TRUs moving into or out of the state. In other words, ARB assumed that the *very same* 7,500 out-of-state TRU trailers would travel into and out of California every day of the year, year-in and year-out. Thus,

⁸ In its Final Statement of Reasons, ARB indicates that its precise estimate was 30,287. ARB's Final Statement of Reasons: ATCM for In-Use Diesel-Fueled TRU, and TRU Generator Sets, and Facilities where TRUs Operate ("FSOR") (Nov. 2004) at 57, attached hereto as Exh. F.

⁹ As evidenced by these figures, the most significant component of the regulated TRU inventory are semi-trailers (rather than truck vans) which are associated with long-haul operations. As to the truck vans, which are associated with more local operations, ARB estimated engines below 15 hp at 4,600 units, and those between 15 and 25 hp at 1,900 units, to reach a total of 6,500.

in considering the costs (and scope) of the rule, ARB was conveniently able to assume that the entire inventory of out-of-state units that might be subject to the Rule would be 7,500. To put this another way, as a fundamental premise of the Rule, ARB embraced the patently ridiculous assumption that, during the twelve-year span of the Rule, only 2.3 percent of the more than 330,000 TRUs that ARB estimates were in operation in the entire rest of the country in 2000 would ever have any occasion to operate in California in a given year. The logic behind that assumption can only charitably be characterized as unreasoned. In any event, any examination of empirical evidence demonstrates that ARB's assumptions are patently incorrect, a fact that is illustrated by the evidence presented with these comments and the testimony of Sierra Research at the January 23, 2006 EPA hearing.

Perhaps not surprisingly (and quite conveniently), ARB did not seek to make this assumption explicit, and certainly made no effort to support it in the record. Nevertheless, a review of the rulemaking record makes clear that ARB relied on this patently flawed assumption in evaluating the costs of compliance with the TRU Rule,¹⁰ thereby grossly understating the costs.

a. ARB has Tacitly Acknowledged that the Assumption that only 7,500 Out-of-State TRUs would Require Conversion was Unfounded, but has Made No Attempt at a Realistic Estimate of the Out-of-State Impacts of the Rule

A careful review of the record reveals that when questioned by ARB Board members at the hearing concerning the out-of-state impacts, ARB staff failed to provide a reasoned response, continuing to focus on the misleading 7,500 figure. However, ARB staff acknowledged that:

¹⁰ ARB's erroneous methodology is described in detail in the Sierra Research report appended to these comments and whose analysis is incorporated by reference. *See* Sierra Research Report, attached hereto as Exh. H.

[c]ertainly there's more than that out there, you know, coming in.
It's not the same one coming in every day.

Excerpts from Transcript of ARB Board Hearing (“ARB Trans.”) (Dec. 11, 2003) at 170, attached hereto as Exh. I. Yet, although ARB staff knew the 7,500 figure was inaccurate and incorrect, ARB never sought to generate any realistic estimate of the actual number of out-of-state vehicles impacted, and continued to distort the actual inventory of out-of-state TRUs by speaking only to the misleadingly low 7,500 figure.¹¹ At the EPA hearing on January 23, 2006, it was once again made clear that ARB staff understood that the 7,500 figure was unsupportable as an estimate of the inventory of out-of-state TRUs captured by the Rule in any given year.¹²

ARB has repeatedly conceded that it reviewed no actual data on the number of in-state and out-of-state TRUs that operate in California, or the extent of TRU use within the state. FSOR at 31 (“No direct data are available on the number of TRUs from out-of-state operating in California at any given time”) (Exh. F); FSOR at 56 (“Although vehicular registration has been

¹¹ The 7,500 figure reflects ARB’s estimate of total out-of-state TRUs in a given year. Over the 12-year span of the Rule, it increased that figure marginally to 12,448. See Sierra Report, Table 2 and accompanying text. Even ARB’s estimate that 7,500 out-of-state TRUs operate in California each day was flawed and likely significantly understated. To estimate the number of out-of-state based TRUs that operate in California each day, ARB assumed, among other things, that only semi-trailers (heavy heavy-duty vehicles (HHDVs) with TRU engines of 25 to 50 hp -- *i.e.*, long haul semi-trailers) based out-of-state would operate in California. In other words, ARB assumed that *not a single* TRU truck van based out-of-state would operate in California. See FSOR at 56 (Exh. F).

¹² See, e.g., EPA Trans. at 48-49 (“MR. ANDREONI [ARB]: One thing to remember with these trucks as they’re coming [from] outside of California, in our report we kind of give an estimate of the number of trucks out of total number of trucks that may be coming through California on any given day which similar, it was around 7500. But remember when these trucks come into California, they may be dropping off a TRU trailer and picking up another trailer and leaving. So because we’re dealing with perishables and delivery and picking up of goods, these trailers are constantly being moved around in and out of the state.”) (Exh. D).

mandated for years, there is no comprehensive registration program for TRUs”) (Exh. F). ARB staff confirmed at the EPA hearing on January 23 that ARB examined no actual data.¹³

Rather, to estimate the number of out-of-state TRUs operating in California on a given day, ARB relied on an assumption from California’s on-road vehicle emissions inventory model (EMFAC2002) that approximately 25 percent of the total HHDV population operating in California on any given day is comprised of HHDVs registered out-of-state. In other words, for every one out-of-state HHDV operating in California, ARB assumed there were three in-state vehicles (a 1-to-3 ratio). ARB states that this assumption is based on vehicle miles traveled (VMTs) information from a U.S. Census Survey. ARB used this 1 to 3 ratio to conclude that about 7,500 out-of-state semi-trailers with TRUs operate in California on any given day. *See* FSOR at 56-57 (Exh. F). ARB then simply ended its analysis, and assumed that the same 7,500 out-of-state TRUs operate in California every day -- and no others.

As discussed in the attached Sierra Research Report (Exh. H), ARB arrived at its single-day TRU population numbers based on TRU sales information and a 1997 Commodity Flow Survey that ARB concluded was consistent with the notion that only “6.4 percent of U.S. TRU sales in all horsepower groups were assumed to be in California.” Based on ARB’s population estimates, in 2000 the nationwide population of TRUs associated with trucks was 355,812. Of

¹³ “Ms. Stewart [EPA]: Just a little bit more on the 7500 engines per day coming into California from outside the state. Do you look at any data, like loading dock data or anything to see how often they’re the same TRUs?”

Mr. Donahoue [ARB]: No. But the issue you know, that occurred . . . with respect to all of this is a very limited amount of data with respect to this. This was really based upon some of the more gross surveys that have been done with respect to trailer traffic within California.” EPA Trans. at 157-58 (Exh. D); *see also id.* at 48 (“MR. DICKINSIN [EPA]: What about vehicle miles traveled, domestic trucks versus 49 state trucks? Any guess on that? MR. TERRIS [ARB]: *I would hate to guess on that*”) (emphasis added).

these, ARB concluded that the population of California-based TRUs was 22,772 or 6.4% of the nationwide population. Thus, ARB assumed an out-of-state TRU population of 333,040 (355,812 - 22,772). Using its 1-to-3 ratio assumption, ARB concluded that 7,515 (22,772 x 0.33) TRUs based out-of-state operated in California each day in the year 2000, which translates to only 2.3% of the total out-of-state-based TRUs. As noted, without analysis or support, ARB then made the irrational assumption that the 7,500 out-of-state vehicles operating daily in California were the same vehicles each day.

In other words, for purposes of determining how many out-of-state TRU units would be covered by the regulation, ARB concluded that only 2.3% of the total out-of-state TRU population would operate in California each year (and indeed, over the life of the TRU Rule).

b. ARB's Assumption that the same 7,500 Out-of-State TRUs Visit California Every Day is Implausible on its Face

As noted above, ARB estimated that approximately 7,500 out-of-state TRUs operate in California each day, out of a total of 30,300 semi-trailer TRUs operating in the state. In estimating the impacts and costs of the TRU Rule on out-of-state operators, ARB assumed that only 7,500 out-of-state units would require controls. *See* Sierra Report (Exh. H). As a result, ARB grossly understated the number of out-of-state TRUs that operate in California, both in real and relative terms, and failed to adequately consider the out-of-state impacts and costs of the TRU Rule.

California has a \$1.4 trillion gross state product, which makes it the fifth largest economy in the world and the largest economic producer and market among the states. One-fifth of the U.S. population lives in California, and the state produces a commensurate share of the US GDP. This is especially true of produce and other commodities that require temperature-controlled freight. In addition, it is the major port of entry for goods entering and departing the West Coast

from Pacific Rim nations. It also is a major corridor of freight coming from Mexico. Given its enormous size and importance to the national economy and the national demand for its goods, and particularly produce, it is simply common sense to conclude that a large percentage of commercial trucks equipped with TRUs, over the 12-year span of the Rule, could be expected to be involved in California operations at some point.

That conclusion is buttressed by the real-world operational experience of motor carriers. In today's national marketplace, it is generally economically impossible for motor carriers to limit the range of operation of their vehicles. Most motor carriers operate on an on-call basis and need to have trucks ready to move to the next available load no matter where it may be headed. England Declaration at ¶ 8 (Exh. A); Cramer Declaration at ¶¶ 4-5 (Exh. B); Testimony of Tom James, Truck Rental and Leasing Ass'n ("TRALA"), EPA Trans. at 96 (Exh. D). As a survey of its members conducted by ATA that is submitted with these comments shows, nearly 75% of the motor carriers stated that they were unable to manage their fleet operations so as to only send certain trucks into California. Report of Martin Labbe Associates, LLC ("Labbe Report") at 2, attached hereto as Exh. J. Only 25% indicated any ability to so manage their fleets, and a significant component of that percentage is attributable to the small portions of their fleet that is dedicated to very limited non-California operations. *Id.*¹⁴ In this respect, private carriers, those that haul their own products, may in some instances be more able to control the range of their fleet operations, but even they need flexibility to efficiently manage their operations.

¹⁴ Moreover, for the overwhelming majority who are not able to " earmark " trailers in their fleet to California, the Hearing Testimony and Declarations attached hereto, establish that national trucking companies can expect virtually all of their TRUs to enter California at some point during a given *year* (90%) even though a small percentage (7%) may be there on a given *day*. See England Declaration at ¶ 11-12.

Finally, it should also be observed that a significant percentage of TRU-equipped vehicles comes from the renting and leasing market. Because leasing companies do not know where their vehicles and trailers will be used after they are leased, they would potentially need to convert significant portions of their non-California TRU-equipped fleets to ensure that they were not leasing non-compliant equipment. *See, e.g.*, Testimony of Tom James, TRALA, EPA Trans. at 97 (Exh. D).¹⁵

3. The Record Evidence in these Proceedings Confirms that ARB's Inventory Assumptions are Wildly Inaccurate and Lack a Reasoned Basis

a. ATA Survey Results Confirm that the ARB Assumption of 7,500 Out-of-State TRUs is Not Plausible

Consistent with the burden to come forward and demonstrate that ARB has given inappropriate consideration to cost and has failed to satisfy the "consistency" criteria of CAA Section 202, ATA recently retained a recognized expert on the trucking industry and its practices to conduct a survey of 200 motor carriers throughout the United States who operate refrigerated trailers that incorporate TRU engines. Responses were received from a cross section of 92 carriers who reported operating a total of 20,690 TRU units, of which 20,118 (97%) were based outside California, and 572 (3%) were based in California. Of the out-of-state TRUs, the responding carriers reported that 67%, or 13,524 units, are expected to operate in California over the next year, and 71%, or 14,239 units, are expected to do so within their useful life. *See* Labbe Report at 2 (Exh. J). In other words, the 92 responding carriers *alone* reported operating 13,524 out-of-state TRUs that enter California annually – almost twice the total number of 7,500 assumed by ARB.

¹⁵ Moreover, as Mr. James testified, motor carriers lease trailers for periods of up to 10 years, and leasing companies are (1) contractually bound to provide compliant equipment, and (2) exercise no control over where that equipment will be operated.

The ATA survey also further illustrates the implausibility of ARB's conclusion that only 2.3% of all out-of-state TRUs enter California annually. Based on the survey responses, the correct annual figure is closer to 67%. Using ARB's conclusion that there were 333,040 total out-of-state TRUs in the United States in the year 2000, this translates into a total of 223,000 out-of-state TRUs that would enter California annually and 340,000¹⁶ over the span of the Rule - or almost 30 times the figures assumed by ARB.

b. Hearing Testimony and Owner-Operator Comments Similarly Demonstrate that ARB's Inventory Assumptions are Incorrect and Lack a Rational Basis

Modern motor carrier fleet management assigns loads on an as-needed basis. As noted above, based on ATA survey data, approximately 75% of respondents indicated that they were not able to manage their California operations so as to only send certain TRU equipped vehicles into the State. Logistics and needed flexibility to move the next load to any destination were the primary reasons given. *See* Labbe Report at 2 (Exh. J).

For any significant motor carrier or trailer leasing operation, economic necessity dictates that each TRU truck van and semi-trailer in the fleet be able to service any potential destination. Otherwise a unit dropping off a load in Kansas City (for example) would not be eligible to carry the next load waiting there, and instead may have to drive hundreds of miles to find another load, while a California-eligible unit would have to drive a significant distance unloaded to pick up the Kansas City freight. *See* England Declaration at ¶ 8 (Exh. A). Due to the very competitive nature of the refrigerated goods transportation industry, virtually all national refrigerated carriers utilize the same basic operational system and would face the same operational feasibility and

¹⁶ This figure exceeds the estimated current number of existing out-of-state TRUs estimated by ARB due to anticipated normal growth in the TRU fleet over the term of the Rule.

financial obstacles to attempting to limit the geographic range of their equipment. *Id.* The model assumed by ARB (without any analysis or empirical support) is directly at odds with the business model described in these comments and supporting materials that is used by the trucking industry to respond to the market demand for goods and services.

In this regard, a substantial portion of temperature-controlled freight is transported on a one-way contract basis – whereby a customer orders a truck and trailer to transport freight from an origin point to a destination, with no further contractual obligation. In this type of operation, once the freight is off-loaded, the tractor and trailer are routed to the next available load, which may require transport virtually anywhere in North America. An example of this type of operation, taken from actual shipments, is set forth in the Declaration of Corey England attached with these comments:¹⁷

A tractor and trailer make an initial pickup of temperature-controlled freight at a Hershey facility in Redlands, California, heading for Portland, Oregon; the load is dropped off and the tractor and trailer are then routed to Boardman, Oregon to pick up another temperature-controlled load at a Lamb Western facility bound for Concord, North Carolina; after the Concord drop-off, the tractor and trailer are routed to Claremont, North Carolina to pick up dry freight from Gulf States Paper that is not temperature sensitive; at the Gulf Paper facility the trailer is exchanged for a loaded trailer from the customer's C.R. England trailer pool and transported to Springvale, Utah; in Springvale, a load from Nestle Frozen Foods is picked up bound for Melrose Park, Illinois, and so forth.

England Declaration at ¶ 5 (Exh. A); *see also* Cramer Declaration at ¶¶ 4-5 (Exh. B).

Such a trip chain may continue in random fashion for as long as two to four weeks, with a vehicle and driver hauling loads to multiple destinations, all unknown at the time the trip begins.

¹⁷ Mr. England, whose expertise includes common industry economics and practice, also presented testimony to this effect at the January 23, 2006 EPA hearing on ARB's authorization request.

In fact, operators and their drivers rarely know before the completion of a shipment where the drivers will be routed to on their next load. England Declaration at ¶ 5 (Exh. A). For all of these reasons, it is a legal and financial necessity for motor carriers that equipment be eligible to operate anywhere in the company's service area -- which for many carriers includes the entire continental United States. *See, e.g.*, England Declaration at ¶ 8 (entire continental United States, Canada, and Mexico) (Exh. A); Cramer Declaration at ¶ 3 (entire West Coast and Texas) (Exh. B); Statement of Frozen Food Express Industries, Inc., page 4 (48 states and Canada) (Exh. C); Topp Declaration at ¶ 1, attached hereto as Exh. K (throughout the United States, as well as service to Canada).

For similar reasons, large trailer leasing operations outside California would be required to replace/convert much or all of their TRU fleets to comply with California's TRU Rule as a matter of economic necessity. The economic realities of fleet leasing operations dictate that all, or virtually all, refrigerated units be eligible for operations in California. Small out-of-state trucking operations would be similarly affected. *See, e.g.*, Declaration of Larry Baarts, attached hereto as Exh. M

In sum, the realities of TRU fleet management and industry practice render it financially and practically impossible for carriers to " earmark " equipment for use only in certain states, as California has assumed. *See, e.g.*, England Declaration at ¶ 8 (Exh. A); Cramer Declaration at ¶¶ 4-5 (Exh. B); Statement of Frozen Food Express Industries, Inc. at 4 (Exh. C). Accordingly, contrary to ARB's assumption, the TRU Rule would regulate vast numbers of TRUs that operate primarily outside California.

c. Record Evidence and Comments from the Truck Leasing Industry also Demonstrate that ARB's Inventory Assumptions are Incorrect and Unreasonably Low

As indicated by the testimony presented at the January 23 hearing, the national fleet of rented and leased vehicles includes approximately 36,000 refrigerated trailers. *See* EPA Trans. at 101 (Exh. D). Because of the nature of the truck renting and leasing industry and the inability for most companies to effectively isolate portions of their fleet from ever operating in the state of California, a significant majority of these vehicles and their TRUs will be impacted by the ARB in-use TRU mandate. The characteristics of the equipment leased by leasing companies is substantially driven by the needs of their trucking company customers, who (as described in detail herein), typically demand equipment that can operate throughout the United States. While the number of leased TRU units subject to the Rule alone dwarfs the number of out-of-state TRUs in the inventory assembled by ARB, there is no evidence that ARB has taken these out-of-state TRUs into account in their analysis of the cost impacts of complying with the Rule. Similarly, there has been no analysis of the problematic enforcement associated with out-of-state leased vehicles. Under the ARB rule, both owners and operators of TRUs would be liable for violations of its standards.

ARB has advanced a hypothesis that modern truck dispatching practices and communications technologies could provide the necessary tools to control the portions of a fleet that would enter California. Limiting these fleet segments to vehicles with compliant TRUs would, under ARB's untested theory of how the industry might reconstitute itself, prevent violations and thus, liability. However, ARB's theory has no basis in fact. As was explained in the January 23, 2006 hearing testimony, and documented in these comments and accompanying materials, modern communication and dispatching tools only help the owners and operators of TRUs better track the current location of equipment, and communicate with drivers and

customers, as a means to increase utilization and minimize non-revenue miles. While these developments have helped make the trucking industry more efficient and competitive, they do not change the basic nature of the business, or allow owners and operators to predict where the next load will come available or its destination -- let alone predict in advance each of the load types and destinations that a piece of equipment will be called upon to service before it embarks on a 2-4 week trip chain.

Furthermore, the owners of rented and leased vehicles are not operating the vehicles they own, and cannot even regularly track the location of their equipment. As a result of this fact, and the nature of the trucking business, the only sure method available to out-of-state owners of rented and leased refrigerated vehicles to ensure that any trailers that may operate in California are compliant with the TRU Rule is to ensure that their entire fleets are converted. Seen in the context of the realities of the truck renting and leasing industry and the limited amount of control the companies in the industry have over the operation of their vehicles, it is even more clear that the number of out-of-state TRUs affected by the rule was significantly underestimated by ARB.

The implications for the lease market underscore the concern that EPA's granting of the ARB request for a waiver of preemption under the Clean Air Act would amount to a *de facto* national standard for owners of rented and leased vehicles with TRUs. As described above, out-of-state owners of rented and leased vehicle fleets (or, for equipment subject to existing lease agreements, the lessees, depending on the terms of the agreements) would have to retrofit or replace TRUs throughout their fleet in order to ensure that any vehicle that a lessor may operate in California will be compliant. As a business reality, this means that vehicles that may never enter into the state of California would have to be compliant in order to fully protect those vehicle owners from liability, and to allow leasing companies to effectively meet the demands of

trucking industry customers who may not be in a position to know whether the rented equipment will enter California during the lease term. ATA questions the authority of the EPA under the Clean Air Act to authorize California's effort to effectively impose such an in-use standard on vehicle owners in all states. It seems quite far reaching that business entities in all 50 states should be so directly impacted by California's effort to achieve local benefits.

d. ARB's Ratios of In-State to Out-of-State TRUs Contradicts its own Prior Findings

Even ARB's assumed 1 to 3 ratio of in-state to out-of-state TRUs operating in California on a given day cannot be reconciled with prior ARB rulemakings that estimated a 3 to 1 ratio of out-of-state trucks to in-state trucks (a 9-fold difference). *See* Staff Report: Initial Statement of Reasons -- Public Hearing to Consider Adoption of the Heavy-Duty Diesel Engine Software Upgrade Regulation ("Chip Reflash"), September 5, 2003, attached hereto as Exh. L. Rather than seeking to reconcile this contradiction, ARB resorted to the inexplicable assertion that "[b]oth ratios are correct based on the available data and purposes described." FSOR at 57 (Exh. F).

ARB states that the TRU Rule ratio was based on vehicle miles, and stated that California-based TRUs "are expected to drive more miles than out-of-state [TRUs] by 3:1 on any given day." *Id.* ARB provided no support for this assumption, which, even if true, would support only a shift from 3-to-1 to 1-to-1. By contrast, in another engine rulemaking, ARB used absolute numbers of vehicles of approximately 300,000 to 400,000 out-of-state and only 100,000 in-state vehicles to describe the respective population of in-state and out-of-state trucks in California. *See* Exhibit K.

4. The TRU Rule's Out-of-State Impacts are Exacerbated by National and Regional Fleet Operators' Practical Inability to Segregate Their Fleets Into California-Compliant and non-California-Compliant Components

By assuming that only 7,500 out-of-state TRUs enter California each year, and thus only some subset of these 7,500 out-of-state units would require retrofits or replacement in the first year under the TRU Rule,¹⁸ ARB has bootstrapped its justification of the Rule into the similarly unreasonable and unsubstantiated assumption that large and small trucking operations will be able to employ illusory, yet-to-be identified fleet management strategies to reduce or nearly eliminate the compliance burdens that will be imposed on out-of-state TRU owners who conduct limited operations within California. Specifically, ARB baldly stated that it “does not believe that entire out-of-state refrigerated fleets, nor more than that portion of any out-of-state refrigerated fleet that actually travels within California, will need to comply.” FSOR at 19. With modern communication technology, ARB asserts that “dispatchers could direct fleet vehicles sending only vehicles with compliant TRU engines to California.” *Id.*

In other words, ARB appears to take the position that, although the TRU Rule applies to any TRU that visits California – even if only once – the rule would not regulate any TRUs that primarily operate out-of-state, because the exact same 7,500 out-of-state based TRUs would visit California each day. However, ARB has performed no analysis and offers no data or evidentiary (or even anecdotal) support for these statements, let alone for the absurd notion that fleet management strategies could result in the exact same 7,500 out-of-state TRUs entering and operating in California each day, and no others. ARB's theories concerning fleet management are inconsistent with reality and with how trucking industry operators actually manage and use

¹⁸ ARB assumed that approximately half (3,721) of the 7,500 out-of-state units would be subject to the retrofit/replacement requirement of the Rule as of 2008. *See* Sierra Report at 6, and Table 3 (Exh. H).

TRU trailers as demonstrated by the above discussion and the hearing testimony and record materials submitted with these comments.

The fact is that large trucking operators must be prepared to assign TRUs to handle contract shipments on an as-need basis, and that any attempt to segregate such a fleet into California-compliant and non-compliant segments would be practically and economically infeasible. As established through the hearing testimony and the attached Declarations and other submissions, in the contract trucking business tractors are dispatched on “trip chains” for 2-4 weeks at a time, and there is no way to predict in advance what destinations the equipment will be called upon to service over that time. *See, e.g.*, England Declaration at ¶¶ 5-8 (Exh. A); Cramer Declaration at ¶5 (Exh. B); Statement of Frozen Food Express at 3-4 (Exh. C). In light of these logistical and flexibility requirements of the business, it is not surprising that the large majority of respondents to ATA’s survey reported that they are unable to segregate their fleets or alter operations so as to only send certain TRUs to California. *See* Labbe Report at 2 (Exh. J).

Because large operators lack the practical ability to operate their businesses effectively and profitably from a business perspective using two separate fleets (one California-compliant, and one non-compliant), it is likely that most or all such operators would be forced to convert their entire fleet to comply with the TRU Rule. Accordingly, it is reasonable to conclude that the number of out-of-state TRUs converted under the Rule will actually exceed the number of TRUs expected to enter California during their useful life. Specifically, as discussed in the attached report of Martin Labbe Associates (Exh. J), while respondents to ATA’s survey indicated that 71% of their TRUs were expected to enter California over their useful lives, the Labbe Report concluded that at least 75% of all out-of-state TRUs would actually need to be converted, based on factors such as the difficulty of distinguishing which specific units would need to enter

California during their useful life. *See* Labbe Report at 4 (Exh. J). As such, ARB truly will have adopted a national standard, forcing its emissions requirements on TRUs that will never enter the state.

5. Out-of-State TRU Operators Impacted by the Rule Were Deprived of Adequate Notice and an Opportunity to Participate in the ARB Rulemaking

As a result of ARB's attempt to regulate TRUs outside its borders, out-of-state TRU operators were deprived of adequate notice of the rulemaking. Unlike a speed limit, idling restriction, or other arguably valid "in use" requirements, the TRU Rule does not merely regulate the use of equipment in California or operator conduct in the state. The TRU Rule requirement of retrofit or replacement of equipment as a condition of entering California imposes a substantial hardship on out-of-state carriers.

Nevertheless, operators of out-of-state TRUs, even those used primarily (or virtually always) outside of California, were not provided adequate notice of the TRU Rule and its out-of-state impacts. Indeed, for this reason, many interested parties out-of-state lacked actual notice of the ARB rulemaking. *See, e.g.*, Testimony of Tom James, TRALA, EPA Trans. at 101 (Exh. D); *see also* Statement of Larry Baarts (Exh. M) ("we find it troubling that a little known state regulation could be so far-reaching"). The fact that EPA's Federal Register Notice of November 21, 2005, constituted the first formal notice to out-of-state operators of the TRU Rule, illustrates both (1) that California has exceeded the scope of its authority under the Clean Air Act by seeking to effectively regulate outside its borders, and (2) the importance of a critical and thorough review of the Rule by EPA taking into consideration the testimony at the January 23, 2006 hearing and these and other comments from the regulated community.

B. Given the TRU Rule’s Dramatic Impacts on Out-of-State Equipment, and Lack of Corresponding Benefit to California from Conversions of Out-of-State Equipment, California “Does Not Need Such . . . Standards to Meet Compelling and Extraordinary Conditions” in the State

As noted above, ARB significantly understates the number of affected out-of-state TRU engines, and ARB failed to properly take into account the realities of industry fleet management, including with respect to large operations outside of California that may be forced to retrofit their entire fleets. Instead, ARB incorrectly assumed that the rule would require conversions of only the 7,500 out-of-state TRU units estimated by ARB to operate in California on a given day, that all California refrigerated deliveries by out-of-state units could be performed by those same 7,500 units each day, and no others.¹⁹

Under the Clean Air Act Section 209(e), the TRU Rule is preempted by federal law unless and until “the Administrator shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such [nonroad] vehicles or engines.” 42 U.S.C. § 7543(e)(2)(A). By statute:

“[n]o such authorization shall be granted if the Administrator finds that --

...

(ii) California does not need such California standards to meet compelling and extraordinary conditions . . .”

¹⁹ ARB has also failed to adjust assumed costs and benefits to take into account the significant number of ordinary hauling (non-refrigerated cargo) operations in California involving TRU trailers that are not operating their TRU engines. *See, e.g.*, England Declaration at ¶ 9 (Exh. A); Topp Declaration at ¶ 4 (Exh. K). In addition, for purposes of its cost estimates, ARB has overstated the number of hours TRUs operate. In its Initial Statement of Reasons, ARB more reasonably assumed that TRUs operate an average of 3 to 4 hours per day, or 1,000 to 1,500 hours per year. *See ISOR* at V-5 (Exh. G). However, in its cost estimates, ARB apparently assumed that TRUs operate from 1,200 to 3,000 hours per year. *See id.*, Appx. G, Matrix 1. In fact, TRU units may operate anywhere from about 1,000 to 2,000 hours per year. *See, e.g.*, England Declaration at ¶ 9 (Exh. A); Cramer Declaration at ¶ 6 (Exh. B).

42 U.S.C. § 7543(e)(2)(A).

Although California may need a program of in-state emissions standards to meet “compelling and extraordinary conditions” in California or in portions of the state (such as the South Coast), the record makes clear that California does not need standards or a program of standards that would require huge numbers of equipment based in other states that are operating on the national highway system, to be retrofitted or replaced based on a single visit to California. ARB made no effort to limit, or even to estimate or take into account, the actual burdens of the TRU Rule on out-of-state operators. If there is to be any meaningful limit on California’s ability to effectively impose its own emission standards on other states, at a minimum there must be some attempt by ARB or EPA to estimate and evaluate the out-of-state impacts of a California standard.

For EPA to grant ARB authorization of its TRU Rule based on the current record would effectively read the second authorization criterion out of the statute as a meaningful part of EPA’s evaluation of the various California standards brought before the agency for authorization review. In that regard, (1) the significant extraterritorial reach of the Rule in contravention of the intent of the statutory scheme, (2) ARB’s gross understatement of the number of affected out-of-state TRUs and the associated failure to develop an accurate estimate of the out-of-state impacts, and (3) the lack of any attempt in the TRU Rule to provide a meaningful or reasonable limit on number of out-of-state TRUs (with minimal California contacts) that would require conversions, serve to distort the “necessity” rationale of ARB’s authorization request and pose issues of scope

and extra-territorial impacts that have never been previously considered by EPA in evaluating Section 209(e)(2)(A)(ii).²⁰

Given the extraordinary reach of the proposed TRU Rule as written, EPA should deny ARB's request for authorization. In the alternative, at a minimum, EPA should remand the authorization request to ARB with instructions that ARB undertake a meaningful evaluation of the TRU Rule's out-of-state impacts, consider the feasibility of regulatory options that limit the Rule's burdens to engines either registered in the state or that are determined to operate principally within California, and that ARB address these issues in the first instance.

C. **The Clean Air Act Does Not Contemplate California's Imposition of "Technology Forcing" In-Use Requirements on Engine Users**

While the CAA contemplates and generally allows "technology forcing" requirements for new engines (if technical feasibility and other CAA requirements are satisfied), this component of the legislation was premised on the assumption that such requirements would fall on manufacturers who would bear the nonconformance penalties (NCPs) if they did not apply the technical resources available to them to meet the challenge.²¹ Moreover, the technology forcing provisions of the CAA are justified from a practical and policy perspective by (1) the regulatory desire to force *manufacturers* to commit resources to research, development and innovation, and (2) the associated asymmetry of information regarding technical capabilities that exists between manufacturers and regulators. In other words, manufacturers generally have more information

²⁰ It should be noted that if EPA were to grant authorization for the TRU rule, EPA would effectively abrogate its ability to critically evaluate other California rulemakings that create a *de facto* national standard, or have their primary impact or effect outside California. *See, e.g.,* California's Request for a Clean Air Act Section 209(b) Waiver of Preemption for California's Adopted and Amended New Motor Vehicle Regulations and Incorporated Test Procedures to Control Greenhouse Gas Emissions (December 21, 2005) (Exh. E).

²¹ *See NRDC v. Thomas*, 805 F.2d 410, 416 (D.C. Cir. 1986).

than regulators about their technical capabilities and may understate their innovative capabilities to regulators as a means to avoid the cost of research and development. To that end, the CAA contemplates that EPA may require manufacturers to innovate and impose accompanying NCPs to “force” them to develop the requisite technology.

The TRU Rule, however, has no regulatory consequence for manufacturers and “forces” them to do absolutely nothing. Instead it would impose what ARB concedes is a currently impossible-to-meet retrofit requirement on users (large and small) and force them to rely on manufacturers over whom they have no leverage or control to develop the technology necessary to comply. In this regard, users lack the expertise and resources to develop their own technical solutions, and manufacturers are not mandated to develop technologies needed for boutique engine retrofit. This is all the more problematic given that ARB itself has recognized that 80% of the trucking industry operators affected by the TRU Rule are small independent operators -- motor carriers who have no organic engineering capability and lack any credible leverage over manufacturers.

Indeed, the TRU Rule gives manufacturers every incentive to ignore the limited TRU retrofit market for the very reason that their failure to develop retrofit technology not only carries no penalty for them, but also places users in the position of having to purchase new engines.²² In this respect, ARB’s approach cannot be reconciled with the Clean Air Act. The TRU Rule would place an unreasonable burden on operators to develop and install retrofits on existing

²² Thus, contrary to the CAA’s concern that manufacturers might understate their ability to innovate in order to avoid regulatory burdens upon themselves, the manufacturers in this instance have the incentive to overstate their ability, as the default consequence will not be an NCP, but increased sales.

equipment -- a burden that the Clean Air Act contemplates can and should only be placed on the original engine manufacturers.

D. The TRU Rule Fails to Satisfy the Technical Feasibility Requirement of CAA Section 209(e) and 202(a)

1. ARB's Significant Understatement of the Number of Affected Out-of-State TRU Engines Undermines any Technical Feasibility Finding

Manufacturers and operators will not be able to respond to the need for control technology within the identified phase-in period provided in the TRU Rule because ARB (1) has significantly underestimated the number of affected TRUs in real terms and (2) has misrepresented the relative apportionment of the universe of TRU engines between in-state and out-of state engines.

This miscalculation is problematic from a lead-time/feasibility perspective inasmuch as ARB has incorrectly assumed that operational practices will allow for the dedication and concentration of "California compliant" TRUs in the state during the phase-in of the Rule. In fact, the number of out-of-state TRUs that will have to be addressed will embrace a significant share of the national market.

2. ARB has Failed to Recognize its Obligation to Determine that Retrofits are Technically Feasible, Taking Cost into Account, Relying Instead On Engine "Replacement" as a Compliance Option

ARB has conceded that its TRU Rule does not rely on any finding by ARB that retrofits will become available or are technically feasible, due to ARB's view that operators can comply by scrapping existing TRUs and replacing or repowering them with new engines. At the ARB Board hearing concerning the TRU Rule, the ARB Executive Officer, Catherine Witherspoon stated:

We want to be clear that staff believes the rule is supportable, even if no retrofit devices emerge, that it passes cost-effectiveness tests, even if the ultimate control strategy is to replace the engine or to

convert to a new engine. *And so we don't want the Board to think that if the technology review turned up no retrofit devices, that it would be our recommendation to stop the rule. We hope some emerge.*

ARB Trans. at 196-97 (Exh. I) (emphasis added).

Similarly, in the formal rulemaking documents, ARB stated:

Although there may be many feasible technology options that are being developed or that could be developed, none have been verified to date under the Verification Procedure and *it would be difficult, if not impossible to predict when this may occur.*

ISOR, Page VI-15 (Exh. G) (emphasis added).

ARB has simply failed to demonstrate that the requisite retrofit technology is feasible, taking into account cost, durability requirements, and warranty requirements.

3. ARB's Technical Feasibility Assumptions are Inconsistent with EPA's Nonroad Engine Rule

ARB's conclusion that the requisite retrofit technology is feasible, notwithstanding that there are as yet no verified technologies demonstrating the same for TRUs subject to the Rule, is also at odds with the conclusions EPA reached in its June 29, 2004 Rulemaking regarding the "Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel." 69 Fed. Reg. 38958. In that rulemaking, EPA recognized that the application of existing emissions reductions technologies to nonroad engines would be "challenging and will require additional time to develop." *Id.* at 38993. The Agency went on to explain that even with those caveats, its assumptions in this regard would not only require additional lead-time and the benefit of technology reviews, but (1) that they were premised on the fact that the rule applied to *new* engines, (2) that engines in the 25-75 hp category would enjoy the benefits of the "strong trend toward the introduction of more advanced electronic fuel system technology in the future," and (3) that that trend would foster falling costs for such systems. *Id.* EPA was careful to note,

however, that such electronic fuel system technology was simply not employed prior to 2001 and therefore, similar assumptions did not hold for engines in that category for those model years.

Id. As such, ARB's assumption that retrofits of engines in model years prior to 2001 are feasible, notwithstanding the lack of currently verified emissions reduction systems and the absence of electronic fuel system technologies, does not withstand scrutiny and cannot be reconciled with EPA's own recent conclusions in that regard.

4. No Retrofits had been Verified for the TRUs Subject to the Rule as of ARB's Application for Authorization.

As ARB has admitted, no Level 2 or 3 VDECS (*i.e.*, retrofits), as required for compliance with the TRU Rule, are currently available or verified for TRUs. Indeed, ARB has conceded that none were available when the rule was proposed in October 2003 (ISOR at VI-15) (Exh. G), when it was finalized in September 2004 (FSOR at 41) (Exh. F), or when ARB requested EPA authorization in March 2005. *See* Letter from Catherine Witherspoon, Executive Officer, Air Resources Board, to Stephen L. Johnson, Acting Administrator, EPA (March 28, 2004) ("Application"), at 20, attached hereto as Exh. N.

In the FSOR, ARB stated that: "Field demonstrations of one or more diesel emission control strategies (DECS) should start in mid- to late-2004. This early experience is designed to produce reliable systems in time for the compliance due dates." FSOR at 41 (Exh. F). However, no such field demonstrations are cited in ARB's March 2005 Application for EPA authorization. While ARB suggested in comments at the EPA hearing on January 23, 2006, that at least some verification applications had been submitted, there is no indication that the applications sought verification for each TRU engine and equipment type and model year impacted by the TRU Rule, or whether any applications are likely to be granted by 2008.

There is now less than 3 years until the TRU Rule's December 2008 retrofit compliance deadline, and not a single TRU retrofit has been verified, made available for review by the affected industry, or tested for reliability under real-world conditions. As ARB conceded in the rulemaking record, reliable TRU technology is essential to ensure the safe transportation of food and other temperature-sensitive cargoes throughout the United States. The existing TRU fleet consists of a wide variety of engine and equipment types and model years, with differing operational and physical characteristics, each of which would require reliable retrofits verified for the particular equipment and model year. However, nothing in the record indicates that there has even been substantial progress toward any level 2 or 3 VDECS retrofit for TRUs since ARB proposed the TRU Rule in October 2003.

5. ARB's Assertion that Technical Feasibility is Demonstrated if an Operator has a "Replacement" Compliance Option is Legally Unsupportable

The fact that an operator could scrap the equipment subject to the rule and purchase new equipment (*i.e.*, replacement of the entire TRU unit, or, for certain later model year equipment, repowering with Tier 4 engines when they become available) does not satisfy the technical feasibility requirement of CAA Section 202(a). The appropriate question for the evaluation of technical feasibility with respect to compliance with in-use engine requirements is whether it is technically feasible (taking into account cost and other factors) for the existing engine to comply with the standard. The fact that the operator can simply discard "noncompliant" engines, and achieve the mandated emission reduction by purchasing a new engine, does not demonstrate technical feasibility with respect to the "in-use" requirement under CAA Section 202.

In this regard, ARB concedes that a repowering option will not be available for 2002 and earlier model years, due to dimensional limitations and incompatible electronic controls.

Application at 18-19. Thus, in these instances, the TRU Rule effectively requires the entire TRU

system be scrapped and replaced with new equipment. Because no long-term Tier 4 PM standard exists for new engines under 25 hp, ARB concedes that operators could only comply with the ULETRU standards, effective 2010, by installing level 3 VDECS or “Alternative Technologies” yet to be approved by CARB. Similarly, because EPA’s long-term Tier 4 PM standard for engines 25 hp and greater commences in 2013, ARB concedes that “it is uncertain whether engines meeting the long-term Tier 4 standards will be available in the marketplace to re-power TRU systems.” Application at 20 (Exh. N).

6. The TRU Rule Depends on Unproven Diesel Particulate Filter (“DPF”) Technology that is Likely Unsuitable for TRUs

Existing DOC technologies cannot achieve particulate matter reductions adequate to achieve Level 2 or 3 VDECS. DPFs can in theory achieve the required PM reductions, and the other technology concepts cited by ARB are in even earlier stages of development than DPFs.²³ In sum, DPFs are the primary potential retrofit technology ARB is relying on to allow compliance with the TRU Rule.²⁴

However, as ARB, engine manufacturers, and others have recognized, DPFs are technically inappropriate for many off-road equipment applications, due to minimum exhaust temperature requirements for passive regeneration. For example, in a study published by ARB scientists, it was recognized that suitability of off-road equipment for DPFs cannot be reliably

²³ From the testimony presented at the EPA hearing on January 23, 2006, it is clear that the other future potential technologies referenced in the ARB rulemaking (such as cryogenics, and electric standby) lack necessary infrastructure support, and are otherwise infeasible, and ARB has not even attempted to argue that such technologies will become available in time for compliance with the TRU Rule.

²⁴ ARB states that it anticipates that DPFs will be used primarily to meet the ULETRU standard, effective in 2010. Application at 22 (Exh. N). However, ARB does not indicate how it anticipates the LETRU standard would be met without DPFs.

predicted based upon engine or vehicle categories, but depends on a complex combination of speed, weight, engine load, duty cycle, and other factors specific to each individual piece of equipment. See Crystal K Reul-Chen et al., *Exhaust and Temperature Profiles for Application of Passive Diesel Particulate Filters to Solid Waste Collection Vehicles in California*, 55 *Journal of the Air and Waste Management Association* 241, 246 (2005), attached hereto as Exh. O.

According to the study:

If significant numbers of other vehicle types (e.g., off-road or street maintenance) cannot use passive DPFs, and no equally effective retrofit technology is approved for engines with lower engine exhaust temperatures, regulators may mandate by default nonretrofit alternatives, such as engine replacement, to reduce diesel emissions from these other vehicles

Id. at 241.

In developing the Portable Engine ATCM, ARB recently reviewed test data and came to a similar conclusion with respect to portable diesel engines:

Based on the exhaust test results, the ARB cannot recommend the use of a passive DPF for all portable diesel engines because in many cases the duty cycle of an engine may not reach the minimum temperatures required for a passive DPF to perform its function. If an operator decides to use a passive DPF, an engine exhaust temperature study is highly recommended to determine if the average engine exhaust temperatures for individual engines do meet the minimum requirements for a passive DPF.

ARB Staff Report: Initial Statement of Reasons: Airborne Toxic Control Measure For Diesel-Fueled Portable Engines, Appendix F (Jan. 2004) (“ISOR Portable Engine ATCM”), at F-2, attached hereto as Exh. P .

In January 2004, ARB rejected a BACT (retrofit mandate) approach for its Portable Engine ATCM. ARB concluded “[w]hile this [BACT] approach is workable for on-road applications, staff did not pursue the approach for portable engines, primarily due to the lack of available emission reduction options for the off-road categories.” See ISOR Portable Engine

ATCM at 40 (Exh. P). Due to the unavailability of new engines equipped with particulate filters until at least 2011, ARB determined that:

the [BACT] approach would force engine owners to initially retrofit some engines by a specific date with technologies that achieve only 20-30 percent reduction and then, by 2020, require these retrofit engines to either be replaced with an engine certified to the applicable proposed Tier 4 off-road emission standard or be retrofitted again with a Level-3 control device or technique. This was not considered to be a cost effective alternative to the proposed ATCM.

See id. at 40-41.

Engine manufacturers have also concluded that active DPFs are not technically feasible or cost-effective for off-road vehicles:

Regulation forcing the use of PM Filters for [non-road mobile machinery] diesel engines should not be considered for introduction before 2010, and consideration needs to be given to the different categories of engine and machine when developing an introduction schedule for regulated PM standards PM Filter technology solutions for [non-road mobile machinery] are required that provide active - automatic regeneration independent of machine application and duty cycle before it would be feasible to introduce an emissions standard for [non-road mobile machinery] engine Type Approval predicated on the use of PM Filter emission reduction capability [and] [a]ctive-automatic PM Filter systems are not currently available at a sufficient level of developmental maturity and commercial viability in general application in [non-road mobile machinery].

See Engine Manufacturers Association, et al., Investigations into the Feasibility of PM Filters for Nonroad Mobile Machinery, at 5 (2002), attached hereto as Exh. Q.

The rulemaking record reflects the fact that TRU duty cycles, and therefore exhaust temperatures, vary widely depending on a number of factors. ISOR at V-5 (Exh. G); ISOR, Appx. J (Activity Analysis of Transport Refrigeration Units). ARB made no finding that passive regeneration DPFs are technically feasible, taking cost into account, for some or all TRUs.

In fact, at the EPA hearing on January 23, 2006, ARB staff conceded that “TRU exhaust temperatures are relatively cool compared to other engines because the load cycle is so light.” Trans. at 42. As discussed above, such low engine exhaust temperatures render the use of DPFs technically infeasible. ARB essentially conceded this fact during the rulemaking, recognizing that TRU duty cycles have lower exhaust temperatures, making passive regeneration less reliable, and that “reliability is essential to perishable goods safety.” ISOR VI-3 (Exh. G).

E. The TRU Rule Fails to Satisfy the “Lead-Time” Aspect of the Technical Feasibility Requirement of Section 202(a)

1. California has Failed to Make an Adequate Determination Regarding the Lead-Time Necessary for TRU Retrofits

ARB cites case law giving “substantial deference” to EPA’s expertise in projecting the likely course of technical development, as support for ARB’s view that EPA should in turn give “great deference” to California lead-time determinations. Application at 18 (Exh. N). At the same time, however, in response to the Board’s request for a Memorandum addressing its legal authority to adopt the TRU Rule, ARB staff advised the Board that Clean Air Act “lead-time” requirements *simply do not apply* to standards such as the TRU Rule that govern in-use engines.

According to the ARB Executive Officer:

The [federal Clean Air Act] requirements for lead-time and stability in adopting standards for heavy-duty vehicles or engines relate only to new heavy-duty vehicles and new heavy-duty engines. The [federal Clean Air Act] requirement is simply not applicable or relevant.

Memorandum from C. Witherspoon, ARB Executive Officer, to A. Lloyd, ARB Chair, and the Board (February 23, 2004) (“ARB Legal Memorandum”) at 5, attached hereto as Exh. R (emphasis in original).

However, EPA has interpreted and applied Section 209(e) to require that nonroad standards satisfy the same Section 202(a) requirements (including technical feasibility) in order

to obtain EPA authorization. *See* 40 C.F.R. Part 85; Air Pollution Control; Preemption of State Regulations for Non-Road Engine and Vehicle Standards, 59 Fed. Reg. 36969 (July 20, 1994).²⁵ *See also* 70 Fed. Reg. 2151, 2152 (January 12, 2005) (“EPA will review nonroad authorization requests under the same ‘consistency’ criteria that are applied to motor vehicle waiver requests,” including consistency with Section 202(a)); 59 Fed. Reg. at 36983. (“EPA shall not grant an authorization . . . if California’s nonroad standards are not consistent with . . . section 209(a), section 209(e), and section 209(b), as EPA has interpreted that subsection in the context of motor vehicle waivers”); *see also* 42 U.S.C. § 7521(a)(3)(A) (emission standards “shall be applicable to vehicles and engines for their useful life” and must be achievable through the application of technology that EPA determines will be available based on the standards for the relevant model year, giving consideration to cost, energy, and safety factors).

The “technological feasibility” component of Section 202(a) obligates California to allow sufficient lead-time to permit development and application of the necessary technology. *See American Motors Corp. v. Blum*, 603 F.2d 978, 981 (D.C. Cir. 1979). While EPA and the Courts have not specifically addressed the application of the lead-time requirement of Section 202(a) in the context of in-use standards, the criterion should be applied similarly to how it is applied to

²⁵ As EPA has explained, Section 209(a) applies to nonroad vehicles because of the language of section 213(d) of the Act, which specifically requires that EPA’s standards regulating nonroad engines and vehicles be subject to sections 206, 207, 208 and 209 of the Act, with such modifications of the applicable regulations as the Administrator deems appropriate. Thus, Congress anticipated that all of section 209 would be applicable to nonroad engines. Subsections (a) through (d) of section 209 do not specifically reference nonroad engines, nor do sections 206, 207 or 208. However, the language of section 213(d) is intended to apply such provisions to nonroad engines. Further indication of Congress’ intent is the language of the last sentence of section 209(e)(1), which states that subsection 209(b) does not apply for purposes of subsection (e)(1). (Section 209(b) provides the procedure under which California can receive a waiver of section 209(a) preemption for motor vehicles.) This sentence would not have been necessary unless subsection 209(a) through (d) otherwise applied. *Id.*

new engine standards. The primary difference is that new engine lead-time can be measured by model year. Absent that convenient yardstick, before imposing a nonroad retrofit requirement, at a minimum ARB must make a determination as to the number of years it believes will be needed to develop the required technologies, giving consideration to cost.

Regardless of the appropriate application of the lead-time requirement, here ARB has made no finding concerning the amount of lead-time necessary to develop the required level 2 and 3 VDECS for TRUs. Indeed, it is difficult to imagine how ARB can reasonably claim that it has made the consistency findings necessary under Section 209(e)(2)(B)(iii) when it asserts that the lead-time requirement is “simply not applicable or relevant.” ARB, at most, has merely paid lip service to the lead-time requirement, and at each stage has merely concluded that lead-time should be adequate. In its ISOR in October 2003, ARB stated that the five years of lead-time before the LETRU effective date of December 31, 2008 was adequate. Subsequently, in its FSOR in September 2004, and its Application in March 2005, ARB repeated that the “over four and a half years” and “nearly 4 years,” respectively, remaining until the December 2008 deadline provided adequate lead-time. FSOR at 41 (Exh. F); Application at 20 (Exh. N).

However, in reciting these conclusions, ARB failed to state what minimum lead-time ARB believes *is* needed, or when the clock begins to run. Nor has ARB indicated that any significant progress has been made toward verified retrofits in the intervening years since the TRU Rule was first proposed in October 2003. Currently, there is less than 3 years of lead-time before the Rule takes effect, and there is no indication that manufacturers have made substantial progress toward developing the retrofits required by the TRU Rule.²⁶

²⁶ At the EPA hearing on January 23, 2006, ARB staff suggested that some “applications” for verification of TRU retrofits had been submitted. However, ARB has apparently not acted on the applications, nor provided any details concerning the applications or the technologies at

(Continued ...)

In discussing lead-time, ARB asserts that “[t]raditional lead-time assumptions that apply to manufacturers of new engines as opposed to the time that end-users must retrofit in-use engines and equipment do not apply when considering in-use performance standards. There is no lead-time required for tooling a production line and there is no clear end date for beginning the base time of production. In this case what matters is whether the product needed for compliance will be on retailers shelves in time for the owners/operators need to comply with the respective December 31, 2008 and 2010 phase-in start dates.” Application at 33 (citations omitted) (Exh. N).

However, ARB fails to recognize that the design, manufacture, and proper integration of retrofit emission controls into existing equipment presents the same issues of lead-time as new engine emission standards, including time necessary to tool a production line and ensure equipment performance. For example, pending Tier 4 standards will include lower PM standards that are expected to require incorporation of end-use DPF controls. This is the same technology as ARB’s primary candidate for TRU retrofits, and its design and manufacture as a retrofit and integration into used engines and equipment involves the same (or more complicated) technical issues as for new equipment. After all, if retrofits could short-circuit the need for lead-time, there would have been no reason for Congress to incorporate lead-time requirements into the CAA -- manufacturers could simply be required to add retrofits as a last step after production.

Given that ARB has not made a determination concerning the amount of necessary lead-time, and has expressed the view that Section 202(a) is irrelevant in this regard, ARB’s suggestion that its lead-time determinations should be “accorded great deference” by EPA is

(Continued ...)

issue, including whether verification was being sought for all of the equipment types and model years covered by the TRU Rule.

inapposite. At a minimum, EPA should remand and instruct ARB to make an appropriate determination concerning lead-time, consistent with CAA Section 202(a).

2. In-Use Retrofit Requirements should Provide the Necessary Lead-Time Measured from the Date that EPA Grants Authorization, and California's "Adoption" of a Rule that would Impose Fixed Compliance Deadlines without EPA Authorization is Void under Section 209(e)

In seeking to explain the continuing lack of any verified TRU retrofits by March 2005, ARB states "[t]his is not unexpected since one could not expect applications for verification to be submitted before the in-use standards were adopted by the ARB and approved by [the California Office of Administrative Law]." Application at 20-21 (Exh. N). However, for the same reasons, one cannot expect full-scale development and verification efforts to commence (if any are commenced at all, since the rule applies to owners and operators, and not the retrofit manufacturers) before the EPA authorization process is undertaken (which includes an opportunity for a public hearing), and EPA grants authorization and allows the rule to go forward.

In fact, the statute expressly forbids California from adopting a nonroad emission standard until authorized by EPA. Under Section 209(e), California cannot "adopt" the TRU Rule until after it obtains EPA authorization. 42 U.S.C. § 7543(e) (if authorization criteria are satisfied, EPA shall "*after* notice and opportunity for public hearing, *authorize California to adopt* and enforce standards and other requirements relating to the control of emissions.") (emphasis added). In part to facilitate the mechanics of rulemaking and EPA review, EPA has interpreted this provision as allowing California to "adopt," but not "enforce," nonroad emission standards prior to obtaining EPA authorization. See 40 CFR §§ 85.1603(d), 85.1604(a); see also 59 Fed. Reg. at 36981-82. However, this interpretation is contrary to the plain language of the statute, at least if applied here.

The statutory prohibition on California's adoption of a rule without EPA authorization serves an important purpose for in-use emission standards, because it allows a clear start date for purposes of determining lead-time. Here, for example, California proposed the TRU Rule premised on over 5 years of lead-time, adopted the rule with 4 1/2 years of lead-time, and requested EPA authorization premised on its analysis in March 2005 that the Rule provides "nearly" four years of lead-time. Even if EPA decided authorization today, the rule will provide less than three years of lead-time. Nowhere along this continuum did ARB make a determination of the amount of lead-time needed to develop the retrofits required under the TRU Rule.

At a minimum, EPA should clarify that its interpretation does not apply to in-use rules with fixed compliance dates. California cannot "adopt" a rule with fixed (but unenforceable) deadlines, and assume that manufacturers (who are not subject to the rule) will begin to make investments and develop the technologies necessary for owner/operators to comply, before EPA has authorized the rule and it becomes enforceable under Section 209(e). This approach is inconsistent with the plain language of the statute, and deprives California, EPA, and the regulated community of the benefit of whatever lead-time ARB and EPA determine is appropriate. EPA authorization provides a clear starting point at which the clock begins to run with respect to lead-time for in-use retrofit requirements.

EPA's interpretation might be permissible if California were to "adopt" a rule with compliance deadlines measured from the date of EPA's authorization. This would allow ARB to make a lead-time determination that could be tested through California rulemaking procedures, including notice and comment, and embodied in a rule "adopted" by California, which could

then be evaluated by EPA. However, California pursued none of these options here, and its adoption of the TRU Rule is preempted and void under CAA Section 209(e).

F. ARB Has Not Given Appropriate Consideration to the Costs of Compliance and its Reasoning in that Regard is Arbitrary and Capricious and Not Supported by the Record

To obtain EPA authorization under CAA Section 209(e), as part of the technical feasibility showing, ARB's rulemaking must give "appropriate consideration to the costs of compliance" 42 U.S.C. § 7521(a). The TRU Rule fails under this test because, as stated previously, ARB grossly understates the number of engines that would be subject to the rule. Further, ARB has failed to properly take into account that large leasing and other operations outside of California may be forced to retrofit their entire fleets to be California compliant (set forth above). In sum, ARB has simply ignored the huge costs of converting hundreds of thousands of out-of-state TRUs that will be subject to the TRU Rule over the life of the regulation.²⁷

Even if one assumes that only a very modest fraction of out-of-state TRUs operate in California during some part of a year, the number of affected out-of-state TRUs is larger than the number of California-based TRUs. For example, if one assumes that 25%, rather than 2.3% (as assumed by ARB), of out-of-state TRUs operate in California during the course of a year, the affected out-of-state TRU population would be about four times greater than the California-based

²⁷ As with lead-time, ARB's failure to give appropriate consideration to the costs of compliance may again be attributable in part to ARB's failure to fully accept the applicability of the authorization requirements of the Clean Air Act, including Section 202(a), to its attempt to regulate existing engines. At the EPA hearing on January 23, 2006, ARB staff re-confirmed its lack of full acceptance of the requirement that cost be appropriately considered: "Mr. TERRIS [ARB]: Section 202(a) always directed itself at the engine manufacturers in terms of cost of compliance. And that--although I'm not saying that it's not relevant, it's--we do not believe that it really is of concern in this matter." EPA Trans. at 155 (Exh. D).

population. In such a case, ARB would have inappropriately underestimated the cost of compliance for out-of-state TRUs by a factor of 11. *See* Sierra Report at 8 (Exh. H). Using ARB's estimated overall cost-effectiveness ratio of \$10 to \$20 per pound of eliminated PM emissions, the corresponding cost-effectiveness ratio for out-of-state based TRUs would be roughly \$110 to \$220 per pound.²⁸

Based on the ATA survey and other data, and the analysis performed by Martin Labbe Associates LLC, the actual portion of out-of-state TRUs that will be impacted by the rule is approximately 75%. *See* Labbe Report at 2 (Exh. J). Using this figure, ARB has underestimated the costs of compliance for out-of-state based TRUs by a factor of almost 33. Again, using ARB's estimated overall cost-effectiveness ratio of \$10 to \$20 per pound of eliminated PM emissions, the corresponding cost-effectiveness ratio for out-of-state based TRUs would be roughly \$330 to \$660 per pound.

The impact of the flux of out-of-state TRUs on the *total* costs of compliance with the TRU ATCM is estimated in Table 4 of the Sierra Research Report. *See* Sierra Report at 10 (Exh. H). Because ARB assumed that the fraction of out-of-state TRUs will remain constant over time, the impact on the total cost of the regulation is proportional to the increase in the number of TRUs actually affected by the ATCM. Table 4 of the Sierra Report shows the impact on the total cost of the rule as a function of the percentage of out-of-state TRUs actually affected by the ATCM. These factors are applied to ARB's lower and upper cost estimates for the program (\$87 and \$156 million as reported on page VIII-1 of the Revised ISOR) to arrive at corrected estimates for the total cost of compliance with the ATCM after accounting for the reality of the

²⁸ This significantly exceeds the \$4-26 cost per pound of reduced PM cited as reasonable in Table VIII-4 of the ARB ISOR.

flux of out-of-state TRUs into and out of California. Using the figure calculated in the Labbe Report that 75% of out-of-state TRUs will actually be affected by the TRU Rule, the total cost of compliance with the ATCM increases from the \$87 to \$156 million estimated by ARB to \$775 to \$1,389 million with the entire difference being borne by operators of out-of-state TRUs.²⁹

Finally, it should be noted that CARB staff's failure to properly account for the number of out-of-state TRUs impacted by the regulation when estimating the cost of compliance for out-of-state TRUs was brought to the attention of ARB staff, as evidenced in Comment 3.d in the Final Statement of Reasons (FSOR) for the rulemaking. ARB staff responded by stating that it had made a "good-faith effort" to estimate the cost of compliance to out-of-state business and individuals, but even ARB staff acknowledged the flaw in its cost analysis, as evidenced by statements made by ARB staff at the Board Hearing. Therefore, in view of the testimonial and documentary evidence presented with these comments, the only conclusion that can be reached here is that because of a fatal flaw in its methodology, ARB staff failed to appropriately estimate the cost of compliance for out-of-state TRUs.

Further to this point, by imposing a *de facto* regional or national standard, the TRU regulation will reduce or eliminate the resale value of existing TRUs (because they will no longer be capable of operation in California) -- a significant additional cost which will have a material financial impact on many operators. See Cramer Declaration (addressing importance of resale value, averaging \$5,000 per TRU trailer) (Exh. B); England Declaration at ¶ 9 (trade-in value of seven-year-old TRU trailers averaging \$13,000) (Exh. A); Labbe Report (reporting average resale price of \$14,112 from ATA survey) (Exh. J). In addition, ARB assumes that fleet

²⁹ Even if one assumed an out-of-state figure of 25%, which approximates California's population relative to the rest of the country, the total cost is between \$302 and \$541 million. See Sierra Report at 10 (Exh. H).

turnover will substantially reduce the number of units that must be repowered, replaced, or retrofit. At the same time, however, ARB concedes that the average useful life of TRUs is 10 years, with some units used for 20 or 30 years, and that the TRU Rule “in effect reduces the useful life of in-use TRUs to seven years.” ISOR at E-5 (Exh. G); FSOR at 43 (Exh. F).

For these reasons, ARB has failed to give “appropriate consideration to the costs of compliance” as required by CAA Section 202(a). 42 U.S.C. § 7521(a).

G. The TRU Rule is the Product of ARB’s Refusal to Acknowledge the Need for EPA Authorization and the Applicability of Established Federal Clean Air Act Authorization Standards, Like Lead-Time

ARB’s failure to come to terms with the fact that EPA authorization is required for the TRU Rule provides important background for EPA’s review and explains many of the deficiencies in ARB’s CAA authorization findings and its rulemaking process.

1. The D.C. Circuit and EPA have made Clear that “Used” Engine Emission Standards Require Authorization

In the 1996 decision *EMA v. EPA*, 88 F.3d 1075 (D.C. Cir. 1996), the D.C. Circuit made clear that EPA authorization is required under CAA Section 209(e) for emission standards applicable to used or “in use” engines. *Id.* at 1088-1093 (holding that Section 209(e) impliedly preempts California emission standards for both new and non-new engines and vehicles, absent EPA authorization). As a result of the *EMA* decision, EPA revised its position and promulgated an Appendix to its regulations consistent with the D.C. Circuit’s ruling:

EPA believes that states are precluded from requiring retrofitting of used nonroad engines except that states are permitted to adopt and enforce any such retrofitting requirements identical to California requirements which have been authorized by EPA under Section 209.

40 CFR pt. 89, Subpart A, Appx. A. These authorities make clear that federal Clean Air Act authorization requirements apply to California regulations applicable to used “nonroad” engines, which is how ARB characterizes its TRU Rule.

2. In Crafting the TRU Rule ARB Proceeded from the Assumption that CAA Preemption had no Application to California Standards for “Used” Engines

ARB has failed to recognize these authorities. For example, in its legal Memorandum advising ARB concerning its legal authority to adopt the TRU Rule, ARB staff advised ARB that:

Neither California nor other states are preempted from adopting or enforcing the use of retrofit technologies on, or other operational strategies to control emissions from, used motor vehicles or used motor vehicle engines.

See ARB Legal Memorandum at 4 (Exh. R).

Similarly, at the same public ARB hearing session during which the TRU Rule was considered, ARB’s General Counsel advised ARB that:

The preemption in the federal law only goes to new engines. We believe these [engines built in 1993 to 1998] are used engines. There’s no federal preemption.

ARB Trans. at 107 (statements of ARB General Counsel Diane Johnston) (Exh. I).³⁰

³⁰ In addition to being incorrect concerning the scope of preemption, this ARB position also contradicts EPA’s views expressed in 1994 concerning when an engine is no longer “new” for authorization purposes. In promulgating the regulations governing authorization requests, EPA stated that “[a]fter a reasonable amount of time has passed and the engine is no longer new (most likely when an engine is being rebuilt), modest retrofit requirements would most likely not be deemed to significantly affect the OEM [Original Engine Manufacturer] and thus such requirements would not be subjected to subsection 209(e)(2).” 59 Fed. Reg. at 36974 (emphasis added). While EPA revised its position concerning preemption after the D.C. Circuit decision in *EMA v. EPA*, 88 F.3d at 1088-1093, (EPA has not revisited this language concerning when a engine is “no longer new.”

Similarly, while contending that EPA should afford “great deference” to ARB lead-time determinations for authorization purposes, ARB continues to maintain that “[federal Clean Air Act] requirements for lead-time and stability in adopting standards for heavy-duty vehicles or engines relate only to new heavy-duty vehicles and new heavy-duty engines. The [federal Clean Air Act] requirement is simply not applicable or relevant.” ARB Legal Memorandum at 5 (Exh. R) (emphasis in original).

Thus, ARB continues to advance the view that EPA authorization is not required for the TRU Rule and has requested EPA authorization simply as a legal precaution. As a result, in crafting the TRU Rule, ARB has not discharged its obligation to fully examine established authorization criteria and to make required CAA findings concerning technical feasibility and lead-time, as discussed below. Accordingly, EPA should undertake a careful and independent review to ensure that ARB has made all of the requisite findings and that the TRU Rule satisfies the statutory criteria for authorization.

H. The TRU Rule is Not Otherwise in Accordance with Law

While ATA submits that EPA need not reach the following issues to conclude that the TRU Rule is inconsistent with the CAA and that the Section 209(e)(2)(a)(ii)-(iii) criteria have not been satisfied, it presents these additional legal arguments for the Agency’s consideration. The Administrative Procedure Act requires that rulemakings and final agency actions must not only have a rational basis, but must also be “otherwise in accordance with law.”³¹

³¹ See *Motor and Equipment Manufacturer’s Ass’n v. EPA*, 671 F.2d 1101 (D.C. Cir. 1979).

1. EPA is Prohibited from Modifying Numerical Emission Standards for Light- and Heavy-Duty Trucks Model Year 2003 or Earlier

CAA Section 202(b)(1)(C) provides: “It is the intent of Congress that the numerical emission standards specified in subsections (a)(3)(B)(ii), (g), (h) [PM and other standards for model year 1996 and later light-duty trucks over 6,000 lbs GVWR], and (i) of this section shall not be modified by the Administrator after November 15, 1990, for any model year before the model year 2004.” By granting authorization for the TRU Rule, EPA would be effectively modifying the numerical PM emission standards (0.1 or 0.12 GPM) for model year 1996 through 2003 light-duty trucks over 6,000 lbs. gross vehicle weight rating equipped with TRUs, contrary to CAA Section 202(b)(1)(C).

2. California Health and Safety Code (“CHSC”) Section 43600 Forecloses Engine Retrofit Requirements unless Mandated by Statute

Unlike a preemption “waiver” required for on-road motor vehicle emission standards under CAA Section 209(b), California must secure EPA’s “authorization” to adopt and enforce any non-road emission standard under CAA Section 209(e). EPA should not authorize a California regulation that is not “otherwise in accordance with law.” *Motor and Equipment Ass’n*, 627 F.2d at 1105 (D.C. Cir. 1979); CAA § 307(d)(9).

In this regard, California Health and Safety Code Section 43600 expressly prohibits CARB from requiring retrofits of used motor vehicles. Specifically, the statute provides that while CARB is empowered to “adopt and implement emission standards for used motor vehicles for the control of emissions therefrom . . . the installation of certified devices on used motor vehicles shall not be mandated except by statute.” *Id.*

While this provision speaks to motor vehicles, rather than “non-road” engines (as CARB intends to treat TRUs), California law lacks any detailed provisions establishing the contours of CARB’s authority to regulate non-road engines. Similar to the manner in which EPA and the

courts have applied the more developed standards and principles applicable to motor vehicles (including certain preemption waiver principles for motor vehicles under CAA Section 209(b) and authorization provisions for off-road vehicles under CAA Section 209(e)) in reviewing federal off-road requirements, absent legislative intent to the contrary, the more detailed and comprehensive California provisions governing the motor vehicle regulations may be applied to clarify the appropriate contours of regulation of non-road mobile sources and equipment.

Absent any express statutory provision to the contrary, it is reasonable to assume that the California legislature intended that CARB should not have broader authority to regulate non-road mobile sources (which are given relatively little attention in California's statutory scheme) than motor vehicles.

In any event, at least to the extent the TRU Rule regulates truck vans, the Rule clearly regulates emissions from motor vehicles, and its retrofit requirements are prohibited by California Health and Safety Code Section 43600.

3. ARB's Request Lacks a Rational Basis Necessary for EPA Review and Fails Due Process Requirements

The APA requires that minimal standards of due process apply with respect to the adoption and enforcement of any regulation, such as the TRU Rule, which carries with it significant penalties for noncompliance. In this regard, it is a fundamental prerequisite of any such regulatory measure that (1) those who may be subject to the rule have adequate notice of its applicability to them, and (2) that the rule does not foster or encourage arbitrary enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 355 (1983). To this end, it is imperative for purposes of due process that the regulation not only speak with clarity in providing notice to those who may be subject to its sanctions, but even more important that the regulation establish minimal guidelines to prevent arbitrary enforcement. *Id.*

The TRU Rule cannot, however, be reconciled with these fundamental prerequisites of due process. Even though the Rule will extend its reach beyond California to hundreds of thousands of existing TRUs, ARB has not only failed to provide notice sufficient to apprise these out-of-state owner/operators that they will be swept up into a California rule of national scope,³² but in addition, ARB has affirmatively misled out-of state owners by representing in its submission to EPA that the Rule will only have *de minimis* out-of-state impacts. As noted previously, most of the burden on TRU owners will fall on those outside the state and more than 95 percent of trucking companies are small businesses. For those entities, ARB's efforts to subject them to its TRU Rule have not been accompanied by adequate notice, and it is reasonable to expect that many of them will be unaware of the actual reach of the Rule until it is enforced against them.³³

With respect to this latter point, ATA notes that the nature of the TRU Rule is such that it will inevitably lead to arbitrary enforcement with respect to out-of-state TRUs. Unlike a regulatory requirement such as speed limit, with respect to which compliance is readily apparent from the operation of the vehicle, police and other enforcement authorities will not be able to identify "noncompliant" out-of state TRUs by visual inspection or mere observation. Rather,

³² Illustrative of this inadequacy of notice is the testimony of the Truck Leasing Association at the January 23, 2006 EPA hearing, in which it was explained that it first became aware of that the Rule had been adopted by ARB when the November 21, 2005 Federal Register notice regarding the request for authorization was announced.

³³ While many of these small trucking companies are represented by associations such as ATA, it is still the case that more than 350,000 trucking companies are not ATA members. The majority of these are small entities who have no reason to suspect that California has written a national emissions standard that will be enforced against them.

lacking a rational framework for applying the Rule to out-of state TRUs, enforcement authorities will necessarily resort to arbitrary stops and investigations.³⁴

4. The TRU Rule Violates the Dormant Commerce Clause

As discussed above, EPA may not be required to consider Commerce Clause issues in this authorization proceeding. *See Motor and Equipment Association*, 627 F.2d at 1095, 1114. Nevertheless, given the TRU Rule's particularly problematic nature under the dormant Commerce Clause, and the Agency may wish to reach that issue and decline authorization on that basis under the circumstances presented here.³⁵

The TRU Rule violates the Dormant Commerce Clause on several independent grounds. First, the Rule has the practical effect of discrimination against interstate commerce due to its proportionally larger impact on out-of-state TRUs, by requiring retrofit or replacement regardless of how little time such equipment is operated in California. For example, in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), the Supreme Court struck down a flat Pennsylvania highway tax that imposed the same cost on in-state and out-of-state carriers. According to the Court: "In practical effect, since the [taxes] impose a cost per mile on

³⁴ The TRU Rule's "voluntary" registration provisions for out-of-state operators only exacerbate the problem as they are premised on the mistaken assumptions that (1) very few out-of-state TRUs are captured by the Rule and (2) that the ARB rulemaking has provided meaningful notice to motor carriers throughout the rest of the country of the Rule's ambitious reach. Moreover, the very fact that the failure of an out-of-state TRU owner/operator to register carries the sanction of enhanced enforcement, undermines the assertion that such registration is "voluntary." In addition, the regulation contains no quantifiable measure (hours of operation, days of operation) or objective criterion (*e.g.*, vehicle registration) that the regulated entity can look to in order to determine whether engines should obtain identification numbers.

³⁵ By bringing to EPA's attention in the context of this authorization proceeding the invalidity of the TRU Rule itself under the Commerce Clause, the California Health and Safety Code, and other relevant law, ATA does not waive, and expressly reserves, the right to challenge the validity of the TRU Rule in any appropriate forum, including any and all challenges on state, federal, and Constitutional grounds.

appellants' trucks that is approximately five times as heavy as the cost per-mile borne by locals trucks, the taxes are plainly discriminatory." *Id.* at 266. The practical discriminatory impacts of the TRU Rule are indistinguishable from those of the Pennsylvania flat highway tax.

Second, even if the TRU Rule did not discriminate in practical effect against interstate commerce, it also fails on the independent Commerce Clause ground that the burden it imposes on interstate commerce is "clearly excessive in relation to the local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). The *Pike* balancing test has been applied by the United States Supreme Court in the context of state mandated trucking equipment in three cases, and in each case the Court struck down the requirement. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, (1958) (invalidating state mud guard regulation); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978) (invalidating state 55 foot trailer length limitation); *Kassel v. Consolidated Freightways*, 450 U.S. 662 (1981) (invalidating 60 foot trailer length limitation and prohibition on use of twin trailer combinations). Here, the burdens on interstate commerce of allowing California to require the retrofit or replacement of any TRU that enters and operates in California, however briefly, is "clearly excessive in relation to the local benefits" of the rule.

Under the *Pike* test, "the extent of the burden that will be tolerated will of course depend upon the nature of the local interest involved, and whether it could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142. Here, ARB made no attempt to craft a TRU regulation with a lesser impact on interstate activities, and California has demonstrated its ability to do so in adopting motor vehicle regulations limited to vehicles with a reasonable connection with the state, such that the vehicles are required to be registered in California. In addition, in other rulemakings addressing non-road engines, California has applied reasonable hour-of-use thresholds to limit the impacts on interstate equipment. *See, e.g.*, Cal.

Code Regs. tit. 17, § 93116.4(c)(2) (Portable Engine ATCM) (“If the portable engine is used out-of-state, then the records may account for operation within California only”); ARB Proposal for Off-Road Diesel ATCM (exempting any off-road vehicle engine “if it is used less than 50 hours per year in California.”)

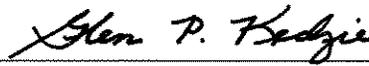
(www.arb.ca.gov/msprog/ordiesel/documents/Reg_Concepts_January_2006.pdf). Under these circumstances, it is clear that California could have achieved the same particulate matter emission reductions from TRU equipment, under a regulatory regime that would have a lesser impact on interstate activities.

Finally, the Supreme Court has also struck down state regulations that “directly regulated” interstate commerce and had an impermissible extraterritorial reach. Under this test, a regulation that has the “practical effect” of controlling activity occurring wholly outside of the state is invalid. *See Healy v. Beer Institute*, 491 U.S. 324, 332 (1989). As described in detail in these comments, the TRU Rule’s requirement that any TRU that operates in California, however briefly, must be retrofitted or replaced, would have the “practical effect” of regulating commerce occurring wholly outside California’s borders by requiring at least some operators and equipment leasing companies to convert equipment that will never actually enter California. Due to the practical and economic realities of the interstate trucking business, and the difficulty of determining in advance which equipment may need to enter California, the TRU Rule falls under the “established view that a state law that has the ‘practical effect’ of regulating commerce occurring wholly outside that State’s borders is invalid under the Commerce Clause.” *See Healy*, 491 U.S. at 332.

IV. CONCLUSION

For all of the above reasons, ATA respectfully submits that ARB's request for authorization of the TRU Rule pursuant to CAA Section 209(e)(2) should be denied or alternatively, remanded to ARB so that it might develop an accurate and appropriate inventory for the out-of-state TRU fleet and craft a revised rule that effectively limits the reach of California's TRU emission standards to engines outside the State in a manner consistent with CAA Section 209.

Respectfully Submitted,



For the American Trucking Associations, Inc.