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August 2, 2022

Environmental Protection Agency
EPA West (Air Docket)
Mail Code 6102T
1200 Pennsylvania Ave. NW, Room B108
Washington, DC 20460
Docket No. EPA-HQ-OAR-2022-0331

Re: Comments in Support of Granting California's Waiver Request for the Advanced Clean Trucks Rule, Zero-Emission Airport Shuttle Rule, and Zero-Emission Powertrain Certification Rule*, Docket No. EPA-HQ-OAR-2022-0331*

The following comments on the U.S. Environmental Protection Agency's (EPA) California's Waiver Request for the Advanced Clean Trucks Rule, Zero-Emission Airport Shuttle Rule, and Zero-Emission Powertrain Certification Rule (collectively, the Zero-Emission Rules), *Docket No. EPA-HQ-OAR-2022-0331,* are submitted by the Moving Forward Network (MFN). The listed members submit the following comments both as individual/organizational comments as well as MFN comments:

Backbone Campaign, Center for Community Action and Environmental Justice, Central Coast Alliance United for a Sustainable Economy (CAUSE), Central Valley Ari Quality Coalition (CVAQ), Citizens for a Sustainable Future, Coalition for Healthy Ports, Comite Civico Del Valley, Inc., Clean Water Action, South Ward Environmental Alliance, CleanAirNow, Coalition for a Safe Environment, East Yard Communities for Environmental Justice, Respiratory Health Association, Environmental Justice (EJ) Working Group - Hudson Hill, Greater Frenchtown Revitalization Council, Groundwork Northeast Revitalization Group (Groundwork NRG), Harambee House/ Citizens for Environmental Justice, Ironbound Community Corporation, Little Village Environmental Justice Organization, LowCounty Alliance for Model Communities (LAMC), Mobile Environmental Justice Action Coalition (MEJAC), New Jersey Environmental Justice Alliance, Peoples Collective for Environmental Justice, Regional Asthma Management & Prevention (RAMP), Rethink Energy Florida, Angela Harris Southeast Care Coalition, Texas Environmental justice Advocacy Services, Tallahassee Food Network, Tishman Environment and Design Center, Warehouse Workers for Justice, West Oakland Environmental Indicators Project, West Long Beach Neighborhood Association, Duwamish River Community Coalition, Robert Laumbach MD, MPH, Natural Resources Defense Council, Earthjustice, Union of Concerned Scientists.

In addition, the following organizations sign on in support of The Moving Forward Network comment letter:

Sierra Club, Southern Environmental Law Center, Environmental Defense Fund, Los Angeles County Electric Truck & Bus Coalition, Jobs to Move America, Environmental Advocates NY,

Pacific Environment, Progressive Asian Network for Actions (PANA), Environmental Justice Committee of the AAPI Equity Alliance, David Toyoshima, Karlton A. Laster.

The Moving Forward Network (MFN), a national network of member groups that center grassroots, frontline knowledge, expertise, and engagement with communities across the United States (US) that bear the negative impacts from the global freight transportation system. In collaboration with allies and partners, MFN identifies local solutions that call for community, industry, labor, government, and political action that advances equity, environmental justice, and a zero-emissions focused just transition. MFN's vision is to see that negatively burdened communities become healthy, sustainable places by reducing and ultimately eliminating the negative impacts of that system. Core to MFN's values, are our organizations' deep commitment to advancing environmental justice, equity, economic justice, and a just transition.

Time and again, the Biden Administration and EPA continue to note the importance of environmental justice communities and zero-emission solutions to the health and success of the nation. Now, more than ever before, EPA has a duty to do everything in its power to ensure that critical emission-reducing policies are adopted at the state and federal levels. Indeed, at the very least, EPA should not stand in the way of life-saving regulations that California has lawfully adopted to reduce tailpipe pollution in our communities. Frontline environmental justice leaders have spent years working with allies to develop the California rules and advocate for their adoption in other states. For communities closest to port operations, fully or partially denying these waivers will harm communities across the country while perpetuating an already dangerous status quo or, worse, increasing the deadly impacts from medium and heavy-duty vehicles. We urge the EPA to grant California's waiver request in full. Not only is the need for these public health protections devastatingly clear, but under the parameters set forth in Clean Air Act Section 209, EPA has no choice but to do so.

The Zero-Emission Rules comprise a suite of measures that are designed to accelerate the transition of California's heavy-duty on-road vehicles to zero-emission technology. These rules are absolutely critical in facilitating the industry-wide transition to zero-emissions that we need to address our public health, air quality, and climate crises. For decades, communities across the United States have been fighting for the right to breathe clean air. We have been forced to hold our breath as the EPA repeatedly delayed adopting strong emission standards. Meanwhile, California has worked steadily and thoughtfully in invoking its leadership authority, granted to it by Congress in the Clean Air Act, 42 U.S.C. § 7543, to develop and adopt life-saving clean air emission standards.

The EPA should not stand in the way of these health-preserving rules, which California lawfully adopted pursuant to its authority. Our organizations urge the Administrator to grant California's waiver request for the Zero-Emission Rules in full, so that California and other Section 177 states may begin to enforce these life-saving regulations and begin to benefit from the countless lives saved and billions of dollars in expected health benefits from these rules.

I. California's Zero-Emission Rules will have tremendous positive impacts on cleaning the air for all Americans.

Medium- and heavy-duty vehicles (MHDVs) are one of the largest sources of nitrogen oxide (NOx) pollution in California, and the country. In California, the heavy-duty trucking sector is responsible for about one-third of all NOx emissions, despite making up a small fraction of vehicles on the road. Much of this pollution, unsurprisingly, is concentrated in low-income communities of color that are already overburdened by compounding environmental injustices. Diesel-powered vehicles emit fine particulate matter (PM2.5) and NOx, which contributes to soot and smog, and when inhaled lead to numerous adverse health outcomes, including premature death. MHDVs are also a major source of climate-warming greenhouse gas (GHG) emissions.

People who live near freight hubs or "diesel death zones"—including ports, highways, warehouses, and rail and intermodal yards—are disproportionately exposed to high concentrations of pollution from the combined activity of diesel-fueled heavy-duty trucks, equipment, rail, and vessels. A person's zip code remains the most significant predictor of health and well-being. In fact, low-income communities of color are forced to breathe in an average of almost one-third more NOx pollution than higher-income and majority-white neighborhoods.[1]

In the absence of EPA developing strong rules to control emissions from this heavily polluting sector, Americans across the country are relying on California to adopt strong emission standards using its authority under the Clean Air Act.

a. Overview of the Zero-Emission Rules.

i. Advanced Clean Trucks (ACT) Rule.

At the direction of the Board, the California Air Resources Board's (CARB) Executive Officer formally adopted the ACT rule in Executive Order R-20-004 on January 26, 2021. California's Office of Administrative Law (OAL) approved the rulemaking and filed it with the Secretary of State on March 15, 2021. The regulation became effective under state law on March 15, 2021.

The ACT rule requires manufacturers to sell an increasing percentage of zero-emission vehicles (ZEVs) or near zero-emission vehicles (NZEVs), *i.e.*, a plug-in hybrid electric, in California, in accordance with the schedule set forth in the following table. Manufactures may earn credits by selling ZEVs or NZEVs beyond the percentage requirements set forth in the regulation. The ACT rule also establishes restrictions for acquiring and retiring credits, as well as reporting and recordkeeping requirements.

[1] Mary Angelique G. Demetillo et al., Space-Based Observational Constraints on NO2 Air Pollution Inequality From Diesel Traffic in Major US Cities, Geophys. Research Letters, Vol. 48 No. 17 (Aug. 25, 2021) https://doi.org/10.1029/2021GL094333.

ACT Manufacturers ZEV Sales Requirement by Model Year

Model Year (MY)	Class 2b-3	Class 4-8	Class 7-8 Tractor
2024	5%	9%	5%
2025	7%	11%	7%
2026	10%	13%	10%
2027	15%	20%	15%
2028	20%	30%	20%
2029	25%	40%	25%
2030	30%	50%	30%
2031	35%	55%	35%
2032	40%	60%	40%
2033	45%	65%	40%
2034	50%	70%	40%
2035 and Beyond	55%	75%	40%

The ACT rule will have tremendous emission reduction benefits, including 5,300 tons of NOx, 144 tons of PM, and 1.68 million metric tons of carbon dioxide equivalent per year in emission reductions, respectively, by 2040.

ii. Zero-Emission Airport Shuttle (ZEAS) Rule.

On June 17, 2019, the CARB Board formally adopted the ZEAS rule in Resolution 19-16. The regulation was approved by OAL and filed with the Secretary of State on January 30, 2020. It became operative under state law on April 1, 2020.

The ZEAS rule sets increasingly stringent zero-emission fleet composition requirements for airport shuttle fleet owners serving the 13 largest airports in California. This rule establishes in-use fleet composition requirements, as follows:

- By December 31, 2027, at least 33% of the fleet must consist of ZE airport shuttles;
- By December 31, 2031, at least 66% of the fleet must comprise ZE airport shuttles; and
- By December 31, 2035, 100% of the fleet must comprise ZE airport shuttles.

On or after January 1, 2036, no fleet owner shall operate an airport shuttle at a regulated airport unless it is a zero-emission airport shuttle or an exempt airport shuttle. Moreover, beginning in MY 2026, airport shuttles with a GVWR of 14,001 or more are required to certify to Zero-Emission Powertrain Certification requirements. The rule also sets forth fleet reporting and recordkeeping requirements.

iii. Zero-Emission Powertrain (ZEP) Certification Rule.

The Board adopted the ZE Powertrain Certification Rule on June 27, 2019 in Resolution 19-15. OAL approved the regulation, which was approved by the Secretary of State on January 21, 2020. The rule became effective under state law on April 1, 2020.

The ZEP Certification rule establishes certification procedures and requirements for MYs 2021 and beyond for battery-electric and hydrogen fuel cell powertrains intended for use in heavy-duty vehicles with a GVWR of 14,001 lbs or more and select medium-duty vehicles. Powertrains certified in accordance with this rule are deemed to have no exhaust emissions of any criteria pollutant or greenhouse gas.

b. Benefits of the Zero-Emission Rules.

The public health, economic, and environmental benefits to California from Zero-Emission Rules are massive.

The ACT rule is projected to avoid 943 premature deaths, 325 hospitalizations from respiratory or cardiovascular diseases, and 453 emergency room visits by 2040.[2] That amounts to $8.9 billion in health savings from 2020 to 2040 for Californians.[3] The ACT rule is also expected to create 7,442 new jobs, generate $5.9 billion in industry savings, and add $282 million to California's GDP by 2040.[4] Finally, the rule is estimated to result in $1.7 billion in avoided CO_2 emissions by 2040.

Although narrower in scope, the ZEAS rule nonetheless provides significant benefits. Net savings to public and private fleets are anticipated to be almost $30 million by 2040.[5] The rule is also expected to reduce 138 tons of NOx, 2.5 tons of $PM_{2.5}$, and 0.5 million metric tons of CO_2e through 2040.[6]

Notably, the projected economic benefits for the ACT and ZEAS rules are based on outdated technology costs and feasibility assessments. Since the rules were promulgated, zero-emission vehicle technology and prices have improved faster than anticipated. As economies of scale are achieved, technological improvements realized, and prices for key components such as batteries decline, zero-emission vehicle costs will continue falling, leading to even greater benefits.

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[2] "Attachment C: Updated Costs and Benefits Analysis for the Proposed Advanced Clean Trucks Regulation." *California Air Resources Board*, 1 May 2020. https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2019/act2019/30dayattc.pdf

[3] *Id.*

[4] *Id.*

[5] "Staff Report: Initial Statement of Reasons." California Air Resources Board, 31 Dec. 2018. https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2019/asb/isor.pdf?_ga=2.17431676.491393855.1658257631-253323433.1561482879

[6] *Id.*

Moreover, while only California can apply for a Section 209(b) waiver, states with areas designated as "non-attainment" for national ambient air quality standards may adopt regulations identical to California's under Section 177 of the Clean Air Act, provided certain conditions are met, including that both California and the Section 177 state adopt the standards at least two years before commencement of the model year(s) affected.[7]

The effect of this is tremendous in that the public health benefits of these rules may extend far beyond California's borders. Indeed, the combined benefits of the Zero-Emission Rules with California's Heavy-Duty Omnibus (HDO) rule will be far-reaching. In addition to the significant public health benefits anticipated in California, the HDO rule is poised to deliver cleaner air from coast to coast. Oregon and Massachusetts have already opted into the HDO rule, and several other Section 177 States, including New York, Washington, Connecticut, and others are in the process of adopting the rule. The HDO rule, while not a zero-emissions rule, nevertheless plays a vital role in reducing harmful emissions from combustion-powered vehicles as statewide fleets begin to transition to zero-emissions.

For example, in New York, the total population of MHDVs is projected to increase by over 40 percent from 2020 to 2050. Even under this boom in truck population, adoption of the HDO rule in New York will result in a 13 percent decrease in cumulative NOx emissions over this same period compared to business-as-usual.[8] On top of this, because these vehicles often travel through communities impacted by air pollution from the freight industry, this decrease in emissions will be particularly meaningful for residents of highly urbanized and freight-adjacent communities.

Moreover, the additive health benefits of opting into *both* the HDO rule and the ACT rule are truly significant. In the less than two years since CARB adopted the final ACT rule, five Section 177 states have formally adopted the rule and therefore committed to requiring manufacturers selling heavy-duty vehicles in their states to manufacture and sell an increasing percentage of zero-emission vehicles. When adopted in tandem, the HDO and ACT rules will maximize emission reductions from this heavily polluting industry and therefore public health benefits.

In fact, in some cases, adopting both rules in tandem nearly triples the anticipated benefits of the rules. For instance, Washington State adopted the ACT rule in 2021 and is anticipated to adopt the HDO rule in the coming months. By adopting both rules, Washington State is expected to experience 132 fewer premature deaths and an additional $1.5 billion in monetized health benefits through 2050—which amounts to nearly three times the number of avoided minor health cases compared to Washington adopting the ACT rule alone.[9] Similarly,

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[7] 42 U.S.C. § 7507.

[8] Minjares, Ray, et al. "Benefits of Adopting California Medium- and Heavy-Duty Vehicle Regulations in New York State." International Council on Clean Transportation, May 2021. https://theicct.org/publication/benefits-of-adopting-california-medium-and-heavy-duty-vehicle-regulations-in-new-york-state/

[9] Lowell, Dana, et al. "Washington Clean Trucks Program: An Analysis of the Impacts of Zero-

other states can expect to see significant additive health benefits by adopting both the HDO and ACT rules.

Benefits of Adopting the HDO and ACT Rules Compared to Adopting the ACT rule Alone, 2020-2050[10]

Health Metric	Washington[11]	New Jersey[12]	Massachusetts[13]
Avoided Premature Deaths	116%	168%	138%
Avoided Hospital Visits	111%	170%	142%
Avoided Minor Cases	120%	171%	136%
Monetized Value, 2020$ (billions)	$1.55	$1.67	$1.02

II. Section 209 of the Clean Air Act dictates that the Administrator grant California's waiver request for the Zero-Emission Rules.

While generally the Clean Air Act prohibits states from adopting emission standards for new motor vehicles,[14] Congress explicitly gave California authority to develop and adopt emission standards that go above and beyond federal levels, so long as California receives a waiver of preemption from EPA to enforce the state's vehicle emission standards.[15] As the legislative history makes clear, in adopting Section 209 of the Clean Air Act, Congress recognized the need for California's leadership in pushing the vehicle industry to develop cleaner technology. Indeed, "unique local conditions virtually demand that California retain strict and hopefully total control over all efforts to reduce emissions within her boundaries."[16]

Emission Medium- and Heavy-Duty Trucks on the Environment, Public Health, Industry, and the Economy." *M.J. Bradley & Associates*, 2021. https://www.ucsusa.org/sites/default/files/2021-09/wa-clean-trucks-report_0.pdf.

[10] Numbers adapted from "Cumulative Public Health Benefits of Clean Trucks Policy Scenarios, 2020-2050" tables in referenced studies.

[11] (Lowell, 2021)

[12] Lowell, Dana, et al. "New Jersey Clean Trucks Program: An Analysis of the Impacts of Zero-Emission Medium- and Heavy-Duty Trucks on the Environment, Public Health, Industry, and the Economy." *M.J. Bradley & Associates*, 2021. https://www.ucsusa.org/sites/default/files/2021-10/nj-clean-trucks-report.pdf

[13] Seamonds, David, et al. "Southern New England Clean Trucks Program: An Analysis of the Impacts of Zero-Emission Medium- and Heavy-Duty Trucks on the Environment, Public Health, Industry, and the Economy." *M.J. Bradley & Associates*, 2021. https://www.ucsusa.org/sites/default/files/2022-01/southern-ne-clean-trucks-report.pdf

[14] 42 U.S.C. § 7543(a).

[15] 42 U.S.C. § 7543(b). Likewise, states that are not in compliance with national ambient air quality standards, *i.e.*, Section 177 states, are entitled to adopt standards identical to California's vehicle emission standards. *Id.* § 7507. Section 177 states must adopt the standards at least two years before commencement of the model year regulated and the state must have a plan approved by the federal government for attaining compliance with the federal air quality standards. *Id.*

[16] H. Rpt. 90-728 at 96-97.

Importantly, there are only narrow circumstances in which EPA is authorized to *deny* California's request for a waiver. In fact, the Administrator *must* grant a waiver to California—so long as the state has determined that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards—unless the Administrator finds one of three scenarios: that (1) the state's protectiveness determination is arbitrary and capricious, (2) California does not need separate state standards to meet compelling and extraordinary conditions, or (3) the state's standards and accompanying enforcement procedures are not consistent with Section 202(a) of the Clean Air Act.[17] Critically, it is the parties opposing California's waiver request who bear the burden of persuading the Administrator that the waiver request should be denied.[18] In other words, EPA should presume that California has satisfied the criteria for granting a waiver request.

EPA itself has confirmed the limits of its authority to deny such a waiver. The agency has specifically noted that "[t]he law makes it clear that the waiver request cannot be denied unless the specific findings designated in the statute can properly be made."[19] Likewise, EPA has repeatedly acknowledged that California maintains discretion in determining issues of public policy that may be ambiguous or controversial in nature.[20] For instance, EPA has noted that "the text, structure, and history of the California waiver provision clearly indicate both a congressional intent and appropriate EPA practice of leaving the decision on 'ambiguous and controversial matters of public policy' to California's judgment."[21]

Under this standard, there is no basis for EPA to lawfully deny California's waiver for the Zero-Emission Rules, because (1) California's protectiveness determination is neither arbitrary nor capricious, (2) there are very clearly compelling and extraordinary conditions that necessitate separate state standards here, and (3) the standards at issue are not inconsistent with Section 202(a) of the Clean Air Act. Therefore, EPA must grant California's waiver request for the Zero-Emission Rules.

a. California's determination that the Zero-Emission Rules are at least as protective of public health and welfare as the federal standards is not arbitrary or capricious.

Each of California's Zero-Emission Rules satisfies the first criterion of Section 209, because each standard, combined with the State's pre-existing emissions control program previously approved by the Administrator, in the aggregate is at least as protective of public health and welfare as the applicable federal standards.

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[17] 42 U.S.C. § 7543(b).

[18] *See* 78 Fed. Reg. 2112, 2116 (Jan. 9, 2013) ("California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied."). *See also Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1121 (D.C. Cir. 1979).

[19] 40 Fed. Reg. 23,102, 23,104 (May 28, 1975).

[20] 78 Fed. Reg. at 2115-16.

[21] *Id.* (quoting 40 Fed. Reg. 23104; 58 Fed. Reg. 4165, 4166 (Jan. 13, 1993)).

Under Section 209, if California has determined that its standards, in the aggregate, are at least as protective of the public health and welfare as applicable federal standards, EPA cannot deny California's waiver request unless the agency concludes California's determination is arbitrary or capricious.[22] In evaluating California's protectiveness determination, EPA compares the stringency of the California and federal standards at issue in a given waiver request.[23] But, importantly, each individual state standard does not need to be at least as stringent as comparable federal standards. Instead, EPA must undertake this comparison within the broader context of the previously waived California program, which itself relies on protectiveness determinations that EPA has already found were not arbitrary and capricious.[24] If the Administrator finds, based on clear and compelling evidence, that California's determination is arbitrary or capricious, then denial of California's waiver request is appropriate.

i. ACT Rule

CARB Executive Officer Richard Corey, in his authority bestowed to him by the Board pursuant to California Health and Safety Code 39516 and Board Resolution 78-10, issued a protectiveness determination for the ACT rule in his letter to EPA Administrator on December 20, 2021. In that letter, Executive Officer Corey states, pursuant to his authority:

> I have determined that the requirements related to the control of emissions associated with the ACT regulation will not cause California motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.

There is no basis for the Administrator to find the Board and Executive Officer's determination arbitrary or capricious. To start, the Administrator has previously granted waivers to California's heavy-duty and medium-duty engine and vehicle emission regulations, and these approved protectiveness determinations establish the broader context of California's emission control program. For example, EPA has previously granted waivers for California heavy-duty regulations for preexisting diesel engine standards[25] and Otto-cycle engine standards,[26] as well as for various regulations applicable to heavy-duty diesel engines and vehicles[27] and heavy-duty

[22] 42 U.S.C. § 7543(b).
[23] 77 Fed. Reg. 9239, 9243 (Feb. 16, 2012).
[24] *Id.*
[25] 70 Fed. Reg. 50,322 (Aug. 26, 2005).
[26] 75 Fed. Reg. 70,238 (Nov. 17, 2010).
[27] 69 Fed. Reg. 59,920 (Oct. 6, 2004); 53 Fed. Reg. 7,021 (March 4, 1988); 52 Fed. Reg. 20,777 (June 3, 1987); 49 Fed. Reg. 39,731 (Oct. 10, 1984); 46 Fed. Reg. 36,742 (July 15, 1981); 46 Fed. Reg. 26,371 (May 12, 1981); 43 Fed. Reg. 36,679 (Aug. 18, 1978); 42 Fed. Reg. 31,639 (June 22, 1977); 36 Fed. Reg. 8,172 (April 30, 1971).

Otto-cycle engines and vehicles,[28] including California's OBD regulations,[29] heavy-duty diesel in-use compliance regulation,[30] emissions warranty and recall programs,[31] heavy-duty diesel engine idling regulation,[32] off-road compression engine emission standards,[33] and certification procedures for hybrid-electric buses and heavy-duty vehicles.[34]

Here, the zero-emission standards and emission-related requirements in the ACT rule are undeniably more stringent than any comparable federal standards. In fact, there are no comparable zero-emission federal requirements. Moreover, the ACT rule's requirements exceed any standards California has already adopted. Therefore, the ACT rule, in combination with California's pre-existing motor vehicle emissions program for medium- and heavy-duty vehicles, is necessarily at least as protective of public health and welfare, in the aggregate, as applicable federal standards. Therefore, it is indisputable that CARB's protectiveness determination for the ACT rule is not arbitrary or capricious.

ii. ZEAS Rule

Likewise, the CARB Board made its protectiveness finding for the ZEAS Rule in Resolution 19-16, in which it resolved:

> BE IT FURTHER RESOLVED that the Board hereby determines that the regulations adopted herein will not cause California motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.[35]

There are no applicable federal rules setting zero-emission requirements for airport shuttles, so California's ZEAS rule necessarily goes above and beyond the federal standards. Likewise, because California's pre-existing motor vehicle emissions program referenced above does not require medium- and heavy-duty vehicles and engines to meet zero-emission standards, the ZEAS rule, in combination with California's existing motor vehicle emissions program, in the aggregate, will necessarily be at least as protective of public health and welfare as applicable federal standards.

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[28] 69 Fed. Reg. 59,920 (Oct. 6, 2004), 53 Fed. Reg. 7,022 (March 4, 1988), 53 Fed. Reg. 6,197 (March 1, 1988), 49 Fed. Reg. 39,731 (Oct. 10, 1984), 46 Fed. Reg. 36,742 (July 15, 1981), 46 Fed. Reg. 26,371 (May 12, 1981), 43 Fed. Reg. 20,549 (May 12, 1978), 42 Fed. Reg. 31,637 (June 22, 1977), 42 Fed. Reg. 31,639 (June 22, 1977), 36 Fed. Reg. 8,172 (April 30, 1971), 34 Fed. Reg. 7,348 (May 6, 1969), and 33 Fed. Reg. 10,160 (July 16, 1968).
[29] 81 Fed. Reg. 78,143 (Nov. 7, 2016); 73 Fed. Reg. 52,042 (Sept. 8, 2008); 77 Fed. Reg. 73,459 (Dec. 10, 2012).
[30] 82 Fed. Reg. 4,867 (Jan. 17, 2017).
[31] 44 Fed. Reg. 61,096 (Oct. 23, 1979); 49 Fed. Reg. 43,502 (Oct. 2, 1984); 55 Fed. Reg. 28,823 (July 13, 1990); 70 Fed. Reg. 50,322 (Aug. 26, 2005).
[32] 77 Fed. Reg. 9,239 (Feb. 16, 2012); 82 Fed. Reg. 4,867 (Jan. 17, 2017).
[33] 75 Fed. Reg. 8,056 (Feb. 23, 2010).
[34] 78 Fed. Reg. 44,112 (July 23, 2013).
[35] CARB Resolution 19-16 (June 27, 2019), at 8-9.

iii. ZEP Certification Rule

Finally, when it adopted the ZEP Certification Rule, the CARB Board approved Resolution 19-15, in which it concluded:

> BE IT FURTHER RESOLVED that the Board hereby determines that the regulations adopted herein will not cause California motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.[36]

There is no reason for the Administrator to find the Board's determination arbitrary or capricious. There are no comparable federal standards to California's ZEP Certification Rule. Likewise, California's pre-existing motor vehicle emissions program does not require heavy-duty vehicles and engines to meet zero-emission standards, so the ZEP Certification Rule, in conjunction with this program, necessarily means that California's emission standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

In sum, California's determinations that the Zero-Emission Rules are at least as protective as federal standards is not arbitrary or capricious. Therefore, California's waiver request satisfies the protectiveness criterion under Section 209(b)(1).

b. There can be no doubt that California continues to need a separate motor vehicle emissions control program to meet the State's compelling and extraordinary conditions.

EPA has consistently acknowledged that California experiences "compelling and extraordinary conditions" that warrant the State's need to adopt its own motor vehicle emissions control program. Indeed, EPA has *never* disputed California's need to reduce emissions of criteria pollutants as it relates to the Section 209(b)(1)(B) inquiry.[37] Because the conditions in

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[36] CARB Resolution 19-15 (June 27, 2019), at 9.

[37] In 2019, in "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program" (SAFE I), 84 Fed. Reg. 51,310 (Sept. 27, 2019), EPA withdrew a portion of a waiver it had already granted to California as part of its Advanced Clean Cars (ACC) program—specifically, the waiver for California's zero-emission vehicle mandate and GHG emission standards. EPA based its withdrawal in part on its determination that California did not need the *specific* emission standards in ACC to address the State's compelling and extraordinary conditions. This determination relied on a novel interpretation of "compelling and extraordinary conditions" that does not apply here.

First, critically, the Administrator expressly noted in the docket for this waiver request that "EPA intends to use [the] traditional interpretation in evaluating California's need for the Advanced Clean Trucks, Zero Emission Airport Shuttle Bus, and Zero Emission Powertrain Certification regulations." EPA, Docket No. EPA-HQ-OAR-2022-0331, Notice of Opportunity for Public Hearing and Comment. EPA explained that the traditional interpretation "mean[s] that California needs a separate motor vehicle program as a whole in order to address environmental problems caused by conditions specific to California and/or effects unique to California (the 'traditional' interpretation)." *Id.*

California have not changed, there is no doubt that California continues to need its own motor vehicle control program to meet its compelling and extraordinary conditions.

The Administrator's review under Section 209(b)(1)(B) relates to "California's need for its program, as a whole, for the class or category of vehicles being regulated, as opposed to its need for individual standards."[38] Indeed, EPA has recognized that California's need is not dependent on the program achieving specific levels of improvement in air quality, or standards regulating to specified levels of stringency.[39] Rather, Congress intended for EPA to defer to California's judgments regarding whether to regulate specific pollutants[40], or how stringently to regulate pollutants.[41] Put another way, the inquiry here relates to "California's need for its program, as a whole, for the class or category of vehicles being regulated, as opposed to its need for individual standards."[42]

Likewise, in reviewing waivers under Section 209(b), the Administrator has determined that "compelling and extraordinary conditions" refers not to the levels of pollution directly, but "primarily to the factors that tend to produce higher levels of pollution—geographical and climactic conditions . . . that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems."[43]

Second, the agency's novel interpretation of "compelling and extraordinary conditions" does not apply to this waiver request regardless. Indeed, in SAFE I, the Administrator expressly noted that its novel interpretation of section 209(b)(1)(B) applies only to waiver requests for GHG emission-reducing standards. *See* 84 Fed. Reg. at 51,341 n.263 ("EPA does not determine in this document and does not need to determine today how this determination may affect subsequent reviews of waiver applications with regard to criteria pollutant control programs.").

Because the Administrator explicitly concluded the agency will apply the traditional interpretation here, and on top of this, because the Zero-Emission Rules address criteria pollutants, the novel interpretation of "compelling and extraordinary conditions" does not apply here.

[38] 76 Fed. Reg. 34,693, 34,697 (June 14, 2011). *See also Dalton Trucking, Inc. v. EPA*, 846 Fed. App'x 442, 443-44 (9th Cir. 2021) (upholding EPA's determination that California continues to experience compelling and extraordinary conditions even under the novel test, while also holding that the novel test only applied in this context because EPA conceded as much there).

[39] 79 Fed. Reg. 46,256, 46,262 (Aug. 7, 2014) ("But nothing in section 209(b)(1)(B) calls for California to quantify specifically how its regulations would affect attainment of the national ambient air quality standards in the state. . . . [T]he relevant question is whether California needs its own motor vehicle pollution program to meet compelling and extraordinary conditions, and not whether the specific standards that are the subject of this waiver request are necessary to meet such conditions.").

[40] 43 Fed. Reg. 25,729, 25,735 (June 14, 1978).

[41] 49 Fed. Reg. 18,887, 18,891 (May 3, 1984) (EPA deferring to California's decision to require even marginal improvements of air quality in adopting diesel particulate emission standards for 1985 and later model year passenger cars, light-duty trucks, and medium-duty vehicles).

[42] 76 Fed. Reg. at 34,697.

[43] 74 Fed. Reg. 32,744, 32,759 (July 8, 2009) (internal quotation marks and citation omitted).

California's unique geography and topography, as well as the considerable and continued growth in on-road motor vehicles—thanks in large part to the recent boom in the freight industry, makes it clear that California has compelling and extraordinary conditions. California continues to experience some of the worst air quality in the nation: of the nineteen areas designated as nonattainment in the State, ten areas in California are classified as Moderate and above.

Statewide, more than 21 million out of over 39 million Californians live in areas that exceed the federal ozone standards; within these areas, MHDVs, as well as the industries they support, contribute to pollutant levels significantly higher than the federal standards. As seen in the below table, both the South Coast and San Joaquin Valley Air Basins are in severe non-attainment of the national ambient air quality standards for PM2.5 and ozone. The South Coast represents many of southern California's coastal counties and contains the Ports of Los Angeles and Long Beach, the two largest ports in the nation. The San Joaquin Valley contains major freight corridors and is responsible for a significant amount of the agricultural production coming out of California.[44]

California's Ozone Nonattainment Areas for 70 ppb 8-Hour Ozone Standard[45]

Nonattainment Area	Classification	Attainment Year	2020 Design Value (ppb)
South Coast Air Basin	Extreme	2037	114
San Joaquin Valley	Extreme	2037	93
Western Mojave Desert	Severe	2032	90
Coachella Valley	Severe	2032	88
San Diego County	Severe	2032	79
Ventura County	Serious	2026	75[25]
Sacramento Metro	Serious[26]	2026	86
Eastern Kern County	Serious[25]	2026	86
Western Nevada County	Serious[25]	2026	75[27]
Mariposa County	Moderate[28]	2023	79
Amador County	Marginal	2020	69
Butte County	Marginal	2020	70[29]
Calaveras County	Marginal	2020	69[30]
Imperial County	Marginal	2020	78
San Francisco Bay Area	Marginal	2020	69
E. San Luis Obispo County	Marginal	2020	70[31]
Sutter Buttes	Marginal	2020	70[32]
Tuolumne County	Marginal	2020	70[33]
Tuscan Buttes-Tehama	Marginal	2020	70[34]

[44] "Agricultural Statistical Review." *California Agricultural Resource Directory*, 2008 https://www.cdfa.ca.gov/statistics/files/CDFA_Sec2.pdf.

[45] Hicks, Austin, and Ariel Fideldy. "Draft 2022 State Strategy for the State Implementation Plan." *California Air Resources Board*, 31 Jan. 2022. https://ww2.arb.ca.gov/sites/default/files/2022-01/Draft_2022_State_SIP_Strategy.pdf

The South Coast has never met *any* of the federal ozone standards established pursuant to the Clean Air Act.[46] In fact, heavy-duty vehicles represent the largest source of NOx emissions needed to attain the 2015 8-hour ozone National Ambient Air Quality Standards (NAAQS) in the South Coast. Moreover, the freight industry has seen a rapid and accelerated boom in recent years, in part due to increased online purchasing as a result of the COVID-19 pandemic. San Bernardino County, which is partly located in the South Coast, has seen some of the most rapid expansion of goods movement over the last five years. New warehouses and distribution centers pop up every day, and heavy-duty diesel trucks are typically the trucks transporting these goods around the region. The following chart demonstrates just how important and central California's medium- and heavy-duty vehicle regulations are to the attainment strategy for the South Coast Air Basin.[47]

Control Measures	**Expected Reductions by 2037 (tons/day)**		
	Nitrogen Oxides (NOx)	Volatile Organic Compounds (VOC)	Particulate Matter (PM2.5)
Stationary Source Measures	20.78	9.10	0.00
Heavy Duty Vehicle Measures (ACT/HDO/ACF/HD I&M)	**36.60**	**0.57**	**0.56**
Other On-Road Measures	5.74	6.99	3.14
Off-Road Measures	61.73	53.39	1.06
Incentive Measures	10.03	0.00	0.17
Total	**157.77**	**76.70**	**5.44**

Source: South Coast Air Quality Management District 2022 Draft Air Quality Management Plan

The San Joaquin Valley sees increased NOx emissions due to the major freight and agricultural corridors that run through the region, contributing to elevated ozone and PM2.5 concentrations. The San Joaquin Valley has some of the nation's worst air quality, resulting from the valley's topography—surrounding mountain ranges trap air pollutants—and pollution sources, including heavy truck traffic on I-5 and Highway 99.[48] In order to attain the 2015 8-hour ozone NAAQS by 2037, the San Joaquin Valley will need to achieve a nearly 40% reduction in emissions. The HDO rule alone represents an approximately 11% reduction in emissions by 2037, making it a critical strategy to improving air quality in the San Joaquin Valley.[49]

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[46] *See* 40 C.F.R. § 81.305.

[47] Praske, Eric, et al. "Draft 2022 Air Quality Management Plan." *South Coast Air Quality Management District*, 2022. Appendix V, Attachment 3, at p. 3, *available at* http://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/2022-air-quality-management-plan/combined-appendix-v.pdf?sfvrsn=8.

[48] EPA Activities for Cleaner Air. *Environmental Protection Agency*, 12 July 2022, https://www.epa.gov/sanjoaquinvalley/epa-activities-cleaner-air.

[49] Hicks, Austin, and Ariel Fideldy. "Draft 2022 State Strategy for the State Implementation Plan." *California Air Resources Board*, 31 Jan. 2022. (pgs. 17, 41) https://ww2.arb.ca.gov/sites/default/files/2022-01/Draft_2022_State_SIP_Strategy.pdf

CARB has repeatedly concluded that the agency must pursue emission reductions from all sources under its authority in order to meet its obligations under the federal Clean Air Act, particularly because California's air pollution is some of the worst in the country.[50] Likewise, EPA has time and again reaffirmed CARB's demonstrations that California experiences compelling and extraordinary conditions warranting the State's own motor vehicle control program.[51] There are no compelling reasons that would justify the Administrator concluding any differently here, so we urge the EPA to once again find that California has satisfied this criterion.

c. California's Zero-Emission Rules are consistent with Section 202(a) of the Clean Air Act.

Moreover, EPA should grant California's waiver request here because the Zero-Emission Rules are not inconsistent with Section 202(a) of the Clean Air Act. Under Section 209(b)(1)(c), the *only* scenario in which EPA may *not* grant a waiver for a state tailpipe standard is if the agency finds that the state standard is "not consistent with" Section 202(a). Because each of California's Zero-Emission Rules are technologically feasible and consistent with federal test procedures, EPA may not deny the State's waiver request under Section 202(a).

EPA itself has clearly articulated the sole requirements for whether a California waiver request is inconsistent with Section 202(a). The only circumstances under which the agency may deny a waiver request under Section 202(a) are, as the agency has put it, "if there is inadequate lead time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to the cost of compliance within that time,"[52] or "if the federal and California test procedures conflict."[53] On top of this, EPA's review under Section 202(a) is, critically, a "narrow" one.[54] Indeed, this inquiry is "*limited* to whether those opposed to the waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with the federal test procedures."[55] Nothing more is required.

The agency's interpretation of Section 202(a) is additionally supported by Congress's clear affirmation in the 1977 Amendments to the Clean Air Act that the waiver provision was designed "to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare."[56] Likewise, the D.C. Circuit in *Motor &*

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[50] CARB Resolution 20-23 (Aug. 27, 2020), at 18.
[51] 70 Fed. Reg. 50,322, 50,323 (Aug. 26, 2005) (EPA found that "CARB has continually demonstrated the existence of compelling and extraordinary conditions justifying the need for its own motor vehicle pollution control program"); 74 Fed. Reg. 32,744, 32,761 (July 8, 2009) ("California's ongoing need for dramatic emission reductions generally . . . is abundantly clear"); 79 Fed. Reg. 46,256, 46,262 (Aug. 7, 2014); 82 Fed. Reg. 4,867, 4,871 (Jan. 17, 2017).
[52] 77 Fed. Reg. 9244.
[53] *Id.*
[54] *Id.*
[55] *Id.* (emphasis added).
[56] *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1297 (D.C. Cir. 1979) (quoting H.R.Rep. No. 95-294, 95th Cong., 1st Sess. 301-302 (1977)).

Equipment Manufacturers Association v. Nichols (MEMA II), 142 F.3d 449, 463 (D.C. Cir. 1998) confirmed the narrow inquiry that EPA is authorized to perform under Section 202(a). The court in *MEMA II*[57] explained that Section 202(a), in the waiver context, "relates in relevant part to technological feasibility and to federal certification requirements."[58] As the Court clarified, the technological feasibility element of Section 202(a) "obligates California to allow sufficient lead time to permit manufacturers to develop and apply the necessary technology," giving appropriate consideration to the cost of compliance in the time frame provided.[59] The federal certification component "ensures that the Federal and California test procedures do not 'impose inconsistent certification requirements."[60]

Contrary to what some members of the Engine Manufacturers Association (EMA) contend, there is no requirement that California-promulgated emission standards have a four-year lead time and three years of stability. Indeed, as EPA and the D.C. Circuit have expressly noted time and again, "[n]either the court nor the agency has ever interpreted compliance with section 202(a) to require more."[61]

Here, California's rules comply with the technological feasibility and certification procedures requirements under Section 202(a).

i. The ACT Regulation is technologically feasible and not inconsistent with Federal test procedures.

The ACT regulation requires manufacturers to sell an increasing number of zero-emission Class 2b-8 vehicles beginning in Model Year 2024. The regulation's sales requirements are consistent with Section 202(a) because the required technology exists. As of 2021, 145 models of Class 2b-8 zero-emission vehicles were available for purchase in the U.S.[62] This is a 625% increase from 2019 and, based on manufacturer announcements, is expected to expand to at least 165 models by 2023.[63]

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[57] MEMA II arose in part from the context of Section 202(m), and as relevant here, in part from the context of Section 202(a). *Id.*

[58] *Ford Motor Co.*, 606 F.2d at 1296 n.17; *see also Motor & Equip. Mfrs. Ass'n, Inc. v. EPA (MEMA I)*, 627 F.2d 1095, 1101-11 (D.C. Cir. 1979).

[59] *MEMA II*, 142 F.3d at 463.

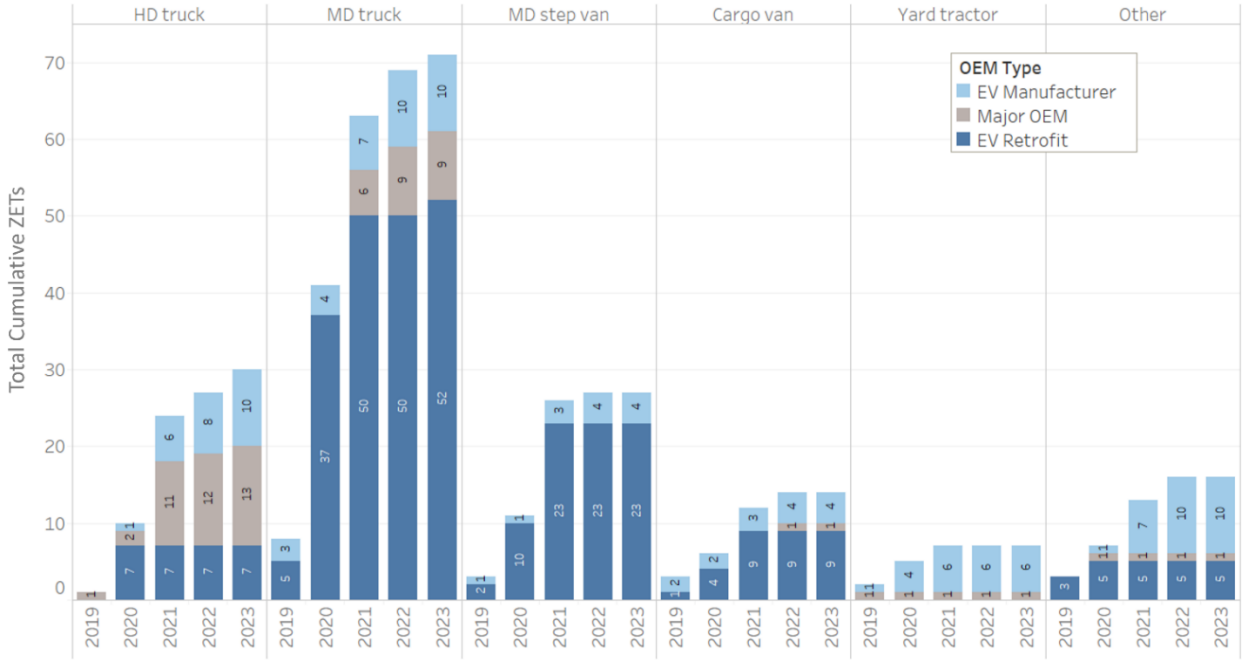
[60] *Id.* (citing Waiver of Federal Preemption, 46 Fed. Reg. 26,371, 26,372 (1981)).

[61] *Id.* (citing *MEMA I*, 627 F.2d at 1101, 1111; *Ford Motor Co.*, 606 F.2d at 1296 n.17; *Am. Motors Corp. v. Blum*, 603 F.2d 978, 981 (D.C. Cir. 1979); Waiver of Federal Preemption, 46 Fed. Reg. at 26,372); 77 Fed. Reg. at 9,247.

[62] Al-Alawi, Baha M, et al. "Zeroing in on Zero-Emission Trucks." *CALSTART*, Jan. 2022. https://calstart.org/wp-content/uploads/2022/02/ZIO-ZETs-Report_Updated-Final-II.pdf

[63] *Id.*

Zero-Emission Medium- and Heavy-Duty Vehicle Availability in the U.S. (2019-2023)[64]



The zero-emission vehicle technology is rapidly maturing. By 2027, many electric work trucks and buses will become less expensive on an upfront and total-cost-of-ownership basis than their combustion engine counterparts.[65] This is largely driven by zero-emission vehicles' comparatively lower fuel and maintenance costs. Even conservative estimates find that based purely on economics, all medium- and heavy-duty zero-emission vehicles will be less expensive to own than fossil fuel vehicles by 2035, and numerous vehicle classes and uses will reach cost parity before 2030.[66]

A recent assessment of the medium- and heavy-duty market readiness for zero-emission truck adoption that considered factors such as charging patterns, operating requirements, market status, and the business case found that 66 percent of the truck fleet has "strong potential for near-term [pre-2025] uptake."[67] Fleet operators and truck manufacturers are aware of zero-emission truck suitability and the potential fuel and maintenance cost savings they offer.

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[64] *Id.*

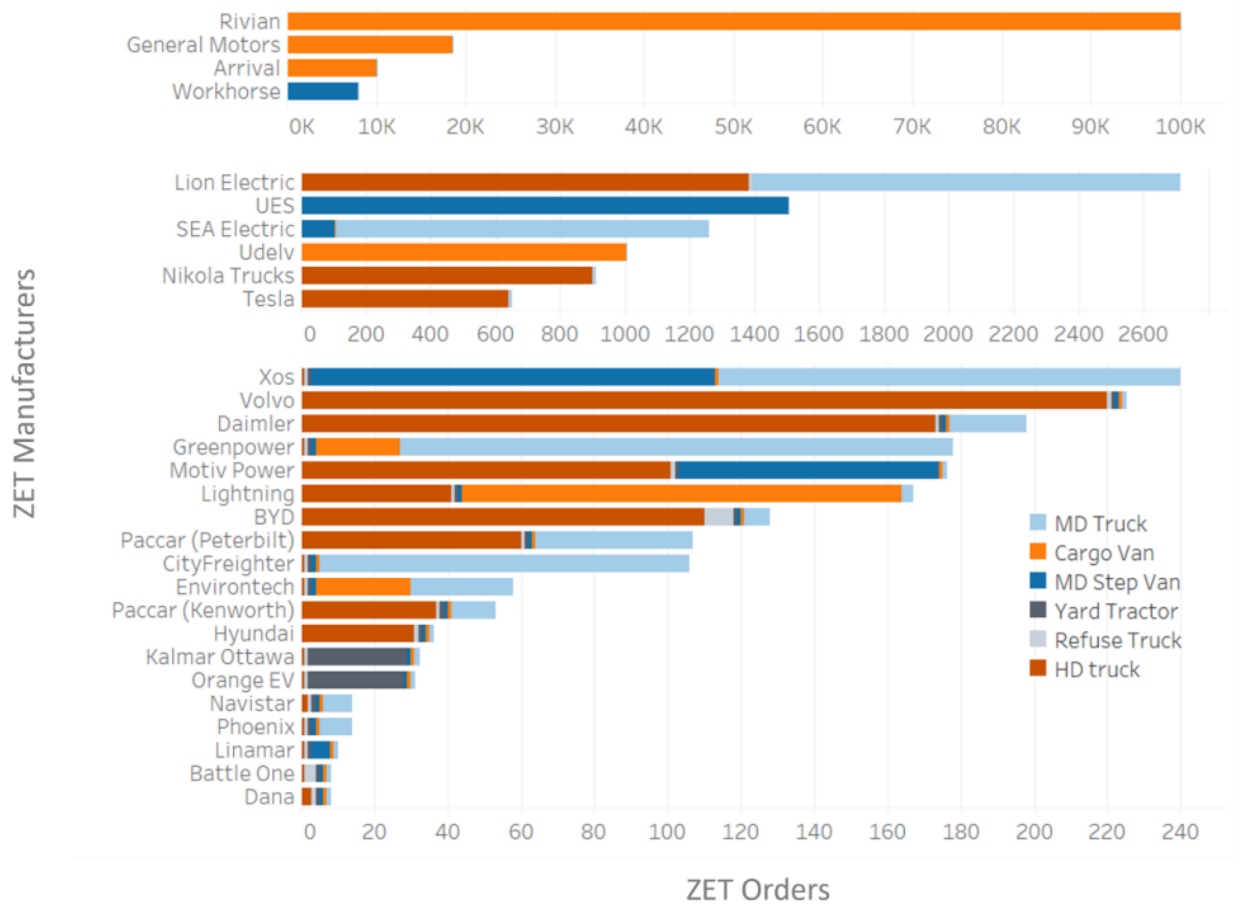
[65] Nair, Vishnu, et al. "Technical Review of: Medium and Heavy-Duty Electrification Costs for MY 2027- 2030." *Roush Industries, Inc.,* 2 Feb. 2022. https://blogs.edf.org/climate411/files/2022/02/EDF-MDHD-Electrification-v1.6_20220209.pdf

[66] Ledna, Catherine, et al. "Decarbonizing Medium- & Heavy-Duty On-Road Vehicles: Zero-Emission Vehicles Cost Analysis." *NREL Transforming Energy*, Mar. 2022. https://www.nrel.gov/docs/fy22osti/82081.pdf

[67] Lowell, Dana, and Jane Culkin. "Medium- & Heavy-Duty Vehicles: Market Structure, Environmental Impact, and EV Readiness." *M.J. Bradley & Associates*, 2021. https://www.mjbradley.com/reports/medium-heavy-duty-vehicles-market-structure-environmental-impact-and-ev-readiness

According to one analysis, there are "over 140,000 pending orders for commercial [zero-emission trucks]," indicating the industry's familiarity and comfort with the existing technology.[68]

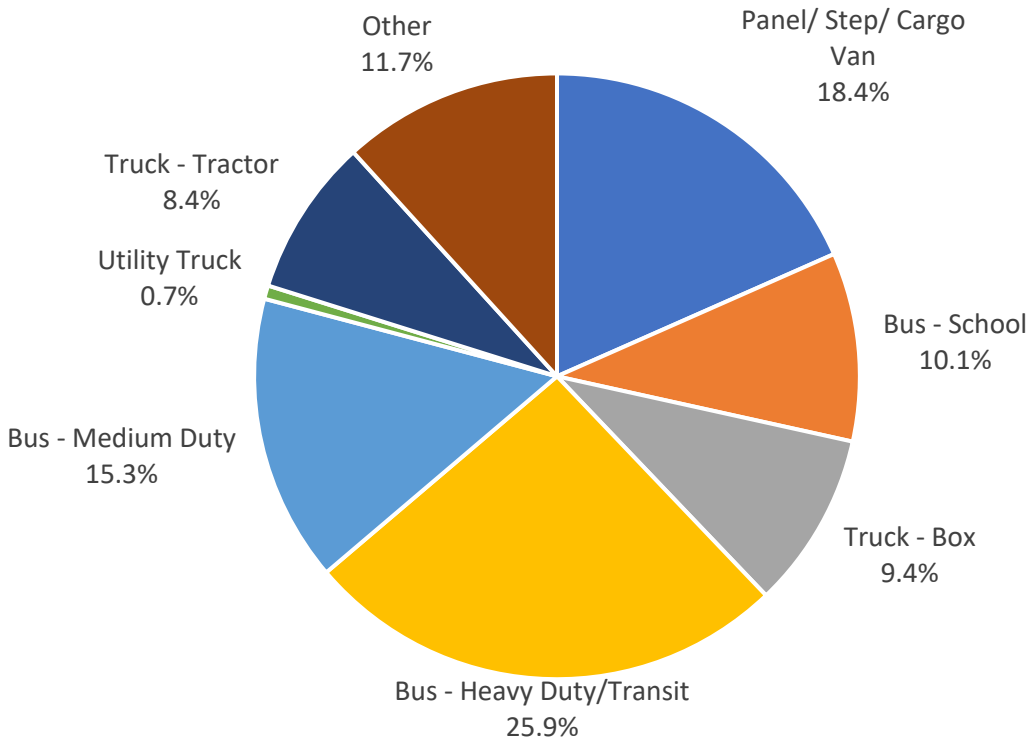
Medium- and Heavy-Duty Zero-Emission Vehicle Orders (As of December 2021)[69]



California's Hybrid and Zero-Emission Truck and Bus Voucher Incentive Project (HVIP) alone has supported over 1,800 zero-emission vehicle sales, nearly 10 percent of which were zero-emission Class 7-8 Tractors.[70] While only a small fraction of the U.S.'s medium- and heavy-duty on-road fleet is currently zero-emission, zero-emission trucks are hitting the road, demonstrating the technology's capabilities and the need for regulations to hasten the adoption of lifesaving zero-emission technology.

[68] (Al-Alawi, 2022)
[69] *Id.*
[70] "Impact - Hybrid and Zero-Emission Truck and Bus Voucher Incentive Project: California HVIP." *California HVIP*, 2022, https://californiahvip.org/impact/.

California HVIP Zero-Emission Voucher by Vehicle Type[71]



As zero-emission medium- and heavy-duty vehicle deployments continue and demand grows, manufacturers are constantly innovating and improving. For example, the second-generation Volvo eVNR tractor-trailer can recharge to 80 percent in 90 minutes and has an 85 percent range improvement.[72] As a result, by the time the ACT rule begins in Model Year 2024, the required zero-emission vehicle technology will be pervasive, advanced, and cost-competitive. Consequently, the ACT rule is consistent with Section 202(a) because it relies on commercially available technology and is cost-effective.

Since there are no comparable federal regulations, the ACT rule does not impose any test procedure inconsistency nor impede manufacturer testing compliance, thus satisfying the federal certification component of Section 202(a).

ii. The Zero-Emission Airport Shuttle (ZEAS) Rule is technologically feasible and not inconsistent with Federal test procedures.

Likewise, the ZEAS regulation, which requires an increasing number of zero-emission airport shuttles to be deployed, is consistent with Section 202(a) because the necessary technology exists and is already in use. As defined by the regulation, airport shuttles are Class 2b or higher vehicles that transport passengers. Airport shuttles are essentially vans and buses,

[71] (California HVIP, 2022)
[72] "Charging Ahead: The Volvo VNR Electric." *Volvo Trucks USA*, 2022, http://www.volvotrucks.us/trucks/vnr-electric/.

which are some of the most mature markets for zero-emission vehicle technology and are often cited as the first and best application for zero-emission medium- and heavy-duty vehicle adoption.[73] Consequently, U.S. airports had deployed at least 250 zero-emission airport shuttles by 2021, with the majority in California.[74]

Airport Zero-Emission Buses State-By-State Distribution (As of September 2021)[75]

State		Full-Size Buses	Small Buses	Total
California	CA	53	101	154
Georgia	GA	2	0	2
Indiana	IN	9	2	11
Maryland	MD	8	0	8
Michigan	MI	2	0	2
Missouri	MO	4	0	4
New Jersey	NJ	12	0	12
New Mexico	NM	2	0	2
New York	NY	24	0	24
North Carolina	NC	14	0	14
Texas	TX	0	6	6
Total		**131**	**119**	**250**

The ZEAS rule relies on commercially available, cost-effective technology and is therefore consistent with Section 202(a).

Since there are no comparable federal regulations, the ZEAS rule does not impose any test procedure inconsistency nor impede manufacturer testing compliance, thus satisfying the federal certification component of Section 202(a).

iii. The Zero-Emission Powertrain Certification Regulation is technologically feasible and not inconsistent with Federal test procedures.

Finally, the ZEP Certification regulation's elements are technically feasible and build upon existing best practices from the zero-emission vehicle and powertrain manufacturing industry. The certification testing equipment and powertrain communications protocols are commercially available, widely used, and, in the case of testing, available in-house or at laboratories across the country.[76] Moreover, the regulation's warranty requirements (protection

[73] Hamilton, Hannah, et al. "Zeroing in on ZEBS." CALSTART, Dec. 2021. https://calstart.org/wp-content/uploads/2022/01/2021-ZIO-ZEB-Final-Report_1.3.21.pdf

[74] (Hamilton, 2021)

[75] (Hamilton, 2021)

[76] "Staff Report: Initial Statement of Reasons." *California Air Resources Board*, 31 Dec. 2018. https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2019/asb/isor.pdf?_ga=2.17431676.491393855.1658257631-253323433.1561482879

for a minimum of 3 years or 50,000 miles) enshrine existing practices rather than impose new burdens since vehicle eligibility for California's HVIP funding depends on providing the same protection.[77] There are currently 173 HVIP-eligible vehicles.[78]

Since the regulation relies on existing practices and widely used commercially available tools, compliance costs are minimal. The California Air Resources Board estimated costs to be $720 (sales weighted average) per vehicle through 2025. However, the per vehicle cost estimate is based on a 2018 projection (pre-ACT rule) that by 2025, 600 ZEP certified vehicles will be sold in California.[79] As explained in the ACT rule section above, medium- and heavy-duty zero-emission vehicle sales are rapidly increasing. As this trend continues, unit costs will decline.

In sum, the ZEP Certification regulation clearly relies on commercially available, cost-effective technology, satisfying the requirements under Section 202(a).

Since there are no comparable federal regulations, the ZEP Certification regulation does not impose any test procedure inconsistency nor impede manufacturer testing compliance, thus satisfying the federal certification component of Section 202(a).

iv. Contentions from the Engine Manufacturers Association are inapposite.

Some members of the EMA contend that EPA is not authorized to grant a California waiver request unless the regulation meets the lead time and stability requirements under Section 202(a)(3)(C). But this is a flawed reading of the statute that both the D.C. Circuit and EPA itself have concluded is incorrect.

Section 202(a)(3)(C), entitled "Lead time and stability," provides:

> Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years beginning no earlier than the model year commencing 4 years after such revised standard is promulgated.[80]

Yet, Section 202(a)(3)(C) is not part of the waiver inquiry requirements under Section 209(b)(1)(C). Indeed, as articulated above, EPA and the D.C. Circuit have clarified that the

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[77] "Implementation Manual for the Hybrid and Zero-Emission Truck and Bus Voucher Incentive Project (HVIP)." *California HVIP*, 15 Mar. 2022. https://californiahvip.org/wp-content/uploads/2022/03/HVIP-FY21-22-Implementation-Manual-03.15.22.pdf

[78] (California HVIP, 2022)

[79] "Staff Report: Initial Statement of Reasons on the Proposed Alternative Certification Requirements and Test Procedures for Heavy-duty Electric and Fuel-cell Vehicles and Proposed Standards and Test Procedures For Zero-emission Powertrains" *California Air Resources Board*, 31 Dec. 2018. https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2019/zepcert/isor.pdf?_ga=2.123392846.491393855.1658257631-253323433.1561482879

[80] 42 U.S.C. § 7521(a)(3)(C).

technological feasibility requirement under Section 202(a) only "obligates California to allow sufficient lead time to permit manufacturers to develop and apply the necessary technology."[81] Likewise, the federal certification component ensures the federal and state test procedures "do not impose inconsistent certification requirements."[82] The Court said nothing about a requirement that California's rules have at least a four-year lead time and three-year stability requirement.

Moreover, EPA has specifically addressed the very issue of what "not consistent" under Section 209(b)(1)(C) means in relation to Section 202(a)(3)(C)'s lead time requirements in a California waiver request. In a case concerning a California waiver request for a proposed alternative power supply (APS) rule for diesel heavy-duty vehicles, the American Trucking Association (ATA) argued that EPA should deny California's request because "CARB ha[d] not complied with the lead time and stability requirements of section 202(a)(3)(C)."[83] Yet, the Administrator concluded otherwise, stating explicitly that "[t]his comment . . . does not comport with the section 209 criteria."[84] Specifically, EPA determined that "the lead-time inquiry EPA undertakes relates to technological feasibility," and "consistency with section 202(a) requires the Administrator to first determine whether adequate technology already exists; or if it does not, whether there is adequate time to develop and apply the technology before the standards go into effect."[85] Indeed, the Administrator explicitly noted that, beyond this, "EPA then has no further inquiry into lead-time, because no additional requirement is imposed by the section 209 criteria."[86] As shown above, California has satisfied these requirements here.

We also direct the Administrator's attention to pages 53-72 of CARB's analysis on the lead time question in California's waiver request to EPA for the Heavy-Duty Low NOx Omnibus Rule, dated January 31, 2022. EPA should review this analysis in connection with CARB's waiver application to show that EPA is not limited to granting a waiver request with a four-year lead time.

Finally, EPA's interpretation of "not consistent" discussed above is similarly corroborated by the explicit wording of Section 202(a)(3)(C) as well as the order, organization, and structure of the statute. First, quite simply, Section 202(a)(3)(C) on its face does not apply to standards promulgated by a state agency under state law, such as California's waiver requests here.[87] Nor does it apply to the Section 177 states that choose to adopt California's regulations. Indeed, the statute does not reference California or any other state at all.

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[81] *MEMA II*, 142 F.3d at 463.
[82] *Id.* (citing Waiver of Federal Preemption, 46 Fed. Reg. at 26,372 (quotation marks omitted)).
[83] 77 Fed. Reg. at 9249 (internal quotation marks omitted).
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] 42 U.S.C. § 7521(a)(3)(C).

Second, the structure of the subsections in Section 202(a) make clear that they describe or limit the powers of *the Administrator*, not of any State. Indeed, Section 202(a)(1) begins with a description of the powers of the Administrator. Section 202(a)(1) provides:

> The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.[88]

Moreover, the subsections that follow, *i.e.*, Sections 202(a)(2)–(a)(6), describe specific authorities or requirements imposed on the Administrator. For example,

> Section 202(a)(2) provides that ***the Administrator*** must provide appropriate lead time for any regulation promulgated under Section 202(a)(1).
>
> Section 202(a)(3)(A) provides that ***the Administrator*** must determine the greatest degree of emissions reduction available.
>
> Section 202(a)(3)(B) provides for standards for heavy duty vehicles to be promulgated ***by the Administrator***.
>
> Section 202(a)(3)(C), quoted above, pertains to heavy duty standards ***promulgated "under this paragraph"*** and does not specify the Administrator or any state.
>
> Section 202(a)(3)(D) provides for promulgation of rebuilding standards ***by the Administrator.***
>
> Section 202(a)(3)(E) provides for promulgation of motorcycle standards ***by the Administrator.***
>
> Sections 202(a)(4)(A) and a(4)(B) provide that ***the Administrator*** must determine whether unreasonable risk exists with respect to any emission control device.
>
> Section 202(a)(5)(A) provides for fill pipe standards set ***by the Administrator***.
>
> Section 202(a)(5)(B) specifies lead time for regulations promulgated ***by the Administrator*** under Section 202(a)(5)(A).
>
> Section 202(a)(6) provides that onboard vapor recovery rules must be promulgated ***by the Administrator***.

[88] *Id.* § 7521(a)(1).

The text throughout these subsections makes plain that Section 202(a)(3)(C) only applies to the Administrator's authority to promulgate emission standards for heavy-duty vehicles. Not only does every other subsection refer directly to "the Administrator"—and not to the States, but Section 202(a)(3)(C) at issue here pertains to "[a]ny standard promulgated or revised under this paragraph."[89] As noted above, this paragraph otherwise only concerns standards promulgated by the Administrator. Accordingly, the most reasonable reading of Section 202(a)(3)(C) given this context is that it is meant to bind EPA, not California or any other state. To reach any other conclusion would be to disregard not only EPA's own interpretation of the Section 202(a) requirement, but also to rewrite Section 202(a)(3)(C) to insert words not put there by Congress.

Moreover, contrary to what EMA may contend, *American Motors Corporation v. Blum*, 603 F.2d 978 (D.C. Cir. 1979) does not compel a different result. This case arose in the light duty context where a statute was enacted specifically to protect the relatively small automakers American Motors Corporation and Avanti against incurring extraordinary expense by designing their own emissions reduction devices rather than buying them from bigger manufacturers. The pertinent statute, not at issue here, imposed a two-year lead time requirement. EPA granted California a waiver for an emissions standard with a shorter lead time and the plaintiffs sued, claiming that the California rule was inconsistent with Clean Air Act Section 202(b)(1)(B)—notably, plaintiffs did *not* argue the rule was inconsistent with Section 202(a).

There, the court recognized that Section 209(b) of the Clean Air Act refers to consistency with Section 202(a), not 202(b), but found that "We think the effect of this congressional mandate is to assimilate or incorporate in section 202(a)(2) the proviso of section 202(b)(1)(B)" and ruled that the two-year lead time in Section 202(b)(1)(B) applied and could not be waived by EPA. Yet, the fact pattern of the *American Motors Corporation* case, arising out of special Congressional concern for small manufacturers of light-duty vehicles, is inapposite here. As we have shown above, the reasoning in that case does not reflect the EPA or D.C. Circuit's current reading of the heavy-duty vehicle lead time section of the statute.

Likewise, language by then EPA Assistant Administrator Mary Nichols in a 1994 EPA docket memo, while on its face favors a strict four-year lead time and three-year stability requirement, is no longer relevant here. There, EPA Assistant Administrator Nichols wrote:

> In light of the plain language and Congressional intent of sections 202 and 209, and applying the rationale of [*American Motors Corp. v. Blum*, 630 F.2d 978 (D.C. Cir. 1979)], I find that the opposing parties have provided persuasive arguments that California is subject to the four year lead time requirement under section 202(a)(3)(b) of the Act and is required to provide four years of lead time for the proposed MDV standards.

But this conclusion predates the EPA response to ATA comments and the *MEMA II* opinion. In the 28 years since, neither Congress nor the EPA has done anything to approve or ratify its

[89] *Id.* § 7521(a)(3)(C).

conclusion—or the reasoning in the *American Motors Corporation* case—and indeed EPA reached the opposite conclusion in 2012 in the APS diesel truck matter described above.

In sum, EPA should find that California satisfied the requirements under Section 202(a).

III. EPA's public hearing process for California's waiver requests was inadequate and must be improved.

The public hearing process on California's waiver requests was woefully inadequate. Section 209(b) of the Clean Air Act requires the Administrator to provide "notice and opportunity for public hearing" when considering whether to authorize California to adopt and enforce emission standards.[90] While the EPA did provide opportunity for public comment here, there were critical deficiencies. We submit the following recommendations for how the EPA should design public hearing processes on all future and ongoing rulemakings and waiver requests going forward.

First, the EPA should promote public participation during the hearing process by engaging affected stakeholders early on. Unlike other stakeholders and EPA staff, most members of impacted communities are the actual experts, since they are directly exposed to and live with the impacts of EPA's decisions. Their expertise is vital to ensuring that the decisions do not add harm but in fact reduce risk. They are not compensated for their time and engagement in the decision-making process. Consequently, the agency should provide additional time for individuals and impacted community organizations to become familiar with technical material and to engage with experts and community members before registering and giving testimony.

Second, the EPA must engage and coordinate with environmental justice communities to ensure that hearings are accessible and held at times and in places that facilitate attendance and participation by affected community members and the public. This is needed to promote greater public participation from affected communities. California's waiver request will impact communities in many states, but Californians in particular. The public hearings should have accommodated California's time zone, rather than prioritizing the Washington, D.C. time zone. The hearings should not have started at 6am PST and ended at 2:00pm PST. Likewise, EPA should add evening and weekend hearings to promote public participation from working community members. The agency should advertise the meetings or public hearings widely. Participants should be allotted more than 7 days to register for public hearings.

Third, EPA's hearings must also be accessible to non-English speakers. The following are targeted suggestions for improving the agency's language accessibility:

- Registration must be offered in key languages spoken throughout the nation, especially in communities of interest and those most impacted. Follow-up instructional emails and zoom calendar invites should be available in the language selected by the registrant.

[90] 42 U.S.C. § 7543(b).

- Materials and website details that are provided in English by the EPA should also be available in the key languages spoken throughout the nation, especially in communities of interest. EPA is responsible for providing translated material, not community members or non-profit organizations.
- Public comment announcements should be made in multiple languages to facilitate the greatest level of public participation.
- Sign language interpretation and simultaneous language translation should be made available for all virtual and in-person listening sessions, hearings, and materials.
- Interpreters should be screened or trained to become familiar with climate change, environmental justice, environmental health and fossil fuel terminology. Interpreters should be available upon request to ask questions during proceedings. The lack of access to simultaneous translation and sign language interpretation was a glaring omission in EPA's public hearing sessions, limiting participation from communities already marginalized by the hearing process.
- EPA should consult impacted communities to determine which language translation services are necessary to support maximum access to information and participation from community members.
- Translation may require additional time. Time management and flexibility must be considered when ensuring public access to the comment process.
- Technical support should be made available when, for instance, the language button does not work and interpretation is then not available.

Fourth, during testimony, interruptions by EPA staff or translators can cause speakers to become distracted or rushed since it could extend time, conflicting with speakers' other obligations. Interruptions during public comment (by an agency interpreter or notetaker, for example) should be discouraged so that individuals have a full and fair opportunity to state their views and concerns. There needs to be clear guidelines that if the Agency interrupts public comment, then the respondent is able to start the clock over and not where they left off. Moreover, EPA should engage Public Participation Specialists to work with community members at specific sites to determine the preferred approaches to engage with communities.

Fifth, the agency should have made information, including reports, documents, and data relevant to the hearing, available to the public at least 30 days before the hearing. The earlier the agency can make materials available, the better it will be for informed public participation. EPA can also increase transparency by preparing a transcript, recording, or other complete record of public hearing proceedings and making it available for public review.

Sixth, EPA must prioritize minimizing interruptions during public comments. It is important that all equipment be tested and seating arranged with the goal of maximizing interactions from participants. Technical support needs to be on hand to assist the public if needed in providing testimony. Testimony was missed during this hearing because technical support could not be given to the environmental justice leader who was scheduled to speak.

Seventh, time allocated for each speaker needs to be equitable and not favorable for one or the other opposing views. There were several instances where extra time was allotted to some people while others were interrupted to stop.

Finally, the EPA should have allowed the public to sign up for a general timeframe. The EPA assigned time to all of those who signed up but did not give enough time for the public to make sure there were no conflicts and how to reschedule if need be.

IV. Conclusion

For the reasons noted above, EPA must fully grant California's Waiver Request for the Zero-Emission Rules, *Docket No. EPA-HQ-OAR-2022-0331*. California's pollution reduction regulations are essential to cleaning the air for communities and the climate. The requested waiver will allow California—and Section 177 states—to accelerate the transition to life-saving, zero-emission medium- and heavy-duty technology. California's rules are critical strategies for reducing dangerous fossil fuel pollution from the freight industry that is plaguing environmental justice communities across the nation. The Zero-Emission Rules are absolutely vital to accelerating the transition to zero-emission vehicle technologies across the country. Indeed, we need every EPA rule, program, and incentive possible to prioritize addressing environmental racism, and protect environmental justice communities in order to address the cumulative impacts effecting our communities and climate crises. The lives of millions are at stake. In sum, we urge EPA to follow decades-long precedent and grant California's waiver request for the Zero-Emission Rules in full, as required by Section 209 of the Clean Air Act.

The Moving Forward Network and our organizations look forward to working together with EPA to create a safer, healthier environment for all communities across the country. We are looking to EPA to be a leader in advancing zero emission, clean air solutions that protect and prioritize the mandatory reduction of pollution in overburdened and underserved environmental justice communities across the freight transportation system. Thank you for the opportunity to provide input on this important rulemaking. If you have any follow up questions, please contact Molly Greenberg, MFN Campaign Manager at greenbergm@oxy.edu.

These comments are submitted on behalf of the entire MFN Network and our over 50 member organizations and the following supporters.

Sincerely,

The Moving Forward Network Advisory Board

Dr. Mildred McClain
Harambee House/ Citizens for Environmental Justice
Southeast Region

Ramsey Sprague
Mobile Environmental Justice Action Coalition
Southeast Region

Rachel Jefferson
Groundwork Northeast Revitalization Group
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With additional signatures from:

Backbone Campaign, Center for Community Action and Environmental Justice, Central Coast

Alliance United for a Sustainable Economy (CAUSE), Central Valley Ari Quality Coalition (CVAQ), Citizens for a Sustainable Future, Coalition for Healthy Ports, Clean Water Action, South Ward Environmental Alliance, CleanAirNow, Coalition for a Safe Environment, East Yard Communities for Environmental Justice, Respiratory Health Association, Environmental Justice (EJ) Working Group - Hudson Hill, Greater Frenchtown Revitalization Council, Groundwork Northeast Revitalization Group (Groundwork NRG), Harambee House/ Citizens for Environmental Justice, Ironbound Community Corporation, Little Village Environmental Justice Organization, LowCounty Alliance for Model Communities (LAMC), Mobile Environmental Justice Action Coalition (MEJAC), New Jersey Environmental Justice Alliance, Peoples Collective for Environmental Justice, Regional Asthma Management & Prevention (RAMP), Rethink Energy Florida, Angela Harris Southeast Care Coalition, Texas Environmental justice Advocacy Services, Tallahassee Food Network, Tishman Environment and Design Center, Warehouse Workers for Justice, West Oakland Environmental Indicators Project, West Long Beach Neighborhood Association, Duwamish River Community Coalition, Robert Laumbach MD, MPH, Natural Resources Defense Council, Earthjustice, Union of Concerned Scientists.

And sign on in support of The Moving Forward Network comment letter from:

Sierra Club, Southern Environmental Law Center, Environmental Defense Fund, Los Angeles County Electric Truck & Bus Coalition, Jobs to Move America, Environmental Advocates NY, Pacific Environment, Progressive Asian Network for Actions (PANA), Environmental Justice Committee of the AAPI Equity Alliance, David Toyoshima, Karlton A. Laster.