December 9, 2021

Liane Randolph
Chair
California Air Resources Board
1100 I Street
Sacramento, CA 95814

Re: CARB Proposed Heavy-Duty Inspection & Maintenance Regulation

Dear Chair Randolph:

I write to offer comments on one aspect of the California Air Resources Board's proposed Heavy-Duty Inspection & Maintenance Regulation, which the Board is currently considering for adoption.

I currently serve as Professor of Environmental Practice at the University of California, Davis School of Law. There I teach numerous courses in environmental, natural resources and constitutional law, including one course that focuses specifically on the intersection of environmental regulatory and constitutional law principles. I similarly devote a considerable amount of my academic research and scholarship to the interplay between constitutional and environmental regulatory principles. Previously, I taught courses on the same subjects at the University of California, Berkeley School of Law.

In a comment letter on the proposed regulation dated November 29, 2021, the American Trucking Association and California Trucking Association assert that imposition of a $30/year "compliance fee" on both heavy-duty vehicles owned and operated by companies based out-of-state would violate the Commerce Clause of the United States Constitution.

I believe that assertion to be without legal merit.

First, I offer one clarification: the industry's reference to and reliance on the U.S. Constitution's Commerce Clause is misplaced. The Commerce Clause, found in Article I, section 8, clause 3 of the Constitution, is an express but limited grant of constitutional authority to the U.S. Congress to regulate commerce among and between the states. Presumably, the industry comment letter in fact relies on so-called "Dormant Commerce Clause" principles. The Dormant Commerce Clause doctrine, developed exclusively through federal court case law rather than being based on any express constitutional text, is sometimes referred to as the "mirror image" of the Commerce Clause: under Dormant Commerce Clause doctrine, state and local governments are precluded from inappropriately discriminating against out-of-state actors in favor of instate citizens and businesses or unlawfully burdening interstate commerce.

Turning to the merits of the Trucking Associations' comment letter, it is of critical importance that the $30 annual compliance fee proposed by CARB staff would apply **equally** to both California-based and out-of-state trucking companies. Accordingly, there is no plausible basis upon which it can be claimed that the proposed fee discriminates against out-of-state actors or unfairly burdens interstate commerce.

Several previously-adopted CARB regulatory programs have been challenged by out-of-state companies and other litigants as violating Dormant Commerce Clause principles. Those legal challenges have been soundly rejected by the courts.

For example, in *Pacific Merchant Shipping Assn. v. Goldstene*, 639 F.3d 1154 (9th Cir. 2009), *cert. denied*, 567 U.S. 934 (2012), CARB adopted air emissions standards for marine vessels reaching 24 miles off the California coast. Those standards were designed to protect air quality in communities surrounding the state's massive international ports. The marine shipping industry' trade association filed suit, challenging the CARB standards in federal court and claiming (among other things) that those standards violated Dormant Commerce Clause principles and were therefore unconstitutional. The U.S. Court of Appeals for the Ninth Circuit rejected that argument, upholding CARB's marine vessel emission standards. That court noted that the CARB standards constituted "an environmental regulatory scheme having only an incidental or indirect effect on commerce." The Court of Appeals further observed that "protection of our environment has repeatedly been recognized as a legitimate and important state interest…[T]he exceptionally powerful state interest at issue here far outweighs any countervailing federal interests." (The U.S. Supreme Court declined to review the Ninth Circuit's ruling.)

Similarly, in Rocky *Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), the Ninth Circuit Court of Appeals rejected a Dormant Commerce Clause-based challenge brought by out-of-state ethanol producers and crude oil trade groups to challenge CARB's "Low Carbon Fuel Standard" (LCFS). The LCFS is a key component of CARB's multifaceted regulatory strategy to reduce California's greenhouse gas emissions. Again, the Ninth Circuit found that CARB's LCFS did "not discriminate against out-of-state commerce." Nor, in that court's view, did the LCFS violate the Dormant Commerce Clause's prohibition on extraterritorial regulation. Noting that "California has long been in the vanguard of efforts to protect the environment, with a particular concern for emissions from the transportation sector," the Court of Appeals concluded that the LCFS was a proper exercise of CARB's regulatory authority. (See also the Ninth Circuit's similar ruling two years later in the same litigation, *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940 (9th Cir. 2019).)

And in *Central Valley Chrysler-Jeep v. Witherspoon*, 456 F.Supp.2d 1160 (E.D. Cal. 2006), the automotive trade industry filed a multifaceted legal challenge to CARB's earliest regulatory measures designed to reduce GHG emissions from motor vehicles. One of the legal theories advanced by the industry was that CARB's regulatory standards contravened Dormant Commerce Clause principles and were therefore unconstitutional. The federal district court disagreed, rejecting the industry's Dormant Commerce Clause-based arguments and declaring the CARB regulatory program constitutional.

Notably, federal courts have similarly upheld a variety of other California state and local government regulatory measures against industry legal challenges predicated on Dormant Commerce Clause theories. For example, in *Association des Eleveurs de Canards et D'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013), the Ninth Circuit Court of Appeals rejected an out-of-state trade group's challenge to California's ban on the sale or marketing of foie gras in California--a regulatory ban based on animal welfare concerns over the force-feeding of poultry.

And in *Pharmaceutical Research and Manufacturers of America v. County of Alameda*, 768 F.3d 1037 (9th Cir. 2014), the Ninth Circuit upheld against Dormant Commerce Clause challenge a California county ordinance requiring—on public health and environmental grounds—prescription drug manufacturers to create and fund a program to collect and dispose of unwanted prescription drugs in that county. The Court of Appeals rejected the pharmaceutical industry's claims that the county ordinance interferes with and directly regulates interstate commerce. Rather, the Court of Appeals concluded, the public health ordinance neither discriminated against nor substantial burdened interstate commerce. Instead, the court concluded, the measure advanced the county's legitimate environmental, health and safety goals, and was fully within the government's police power authority.

Key to the courts' resolution of all of the above-described Dormant Commerce Clause-based legal challenges of CARB and other California regulatory programs is a central point of direct relevance to CARB's current deliberations: as is the case with CARB's proposed Heavy-Duty Inspection & Maintenance Regulation, each of the previous programs was even-handed in nature, treating California and out-of-state businesses in a comparable manner. Each challenged regulation was understandably and properly found by reviewing courts not to discriminate against interstate commerce or out-of-state actors.

Finally, a critical underpinning of both CARB's currently-proposed regulation and those challenged in the above-described cases is the need to create a level playing field for the regulated community. Granting exemptions or favored regulatory treatment to out-of-state companies vis-à-vis California-based businesses would provide the former with an unfair competitive advantage over the latter. Nothing in Dormant Commerce Clause legal principles compels such a result. The Board should therefore reject the trucking industry's attempt to achieve that very end through its flawed constitutional analysis and advocacy.

Respectfully submitted,

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