



Natural Gas Vehicles for America

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**Clerk of the Board  
California Air Resources Board  
1001 I Street  
Sacramento, California 95814**

**Electronic Submission:** <https://ww2.arb.ca.gov/applications/public-comments>

**RE: Proposed Advanced Clean Fleets Regulations**

**Introduction**

NGVAmerica appreciates the opportunity to provide the following comments in response to the California Air Resources Board (CARB) proposed Advanced Clean Fleets (ACF) rule. NGVAmerica is the national trade association dedicated to the decarbonization of the transportation sector through the increased use of gaseous fuels including renewable and conventional natural gas and, eventually, hydrogen. Our 200-plus member companies produce, distribute, and market natural gas and renewable natural gas (RNG, also called biomethane), manufacture and service natural gas vehicles (NGVs), engines, and equipment, and operate fleets powered by clean-burning gaseous fuels across North America.

NGVAmerica applauds California's leadership on environmental matters. Over the years our members have been at the forefront of delivering low-emission and near-zero emission technologies that have continued to provide significant and critical reductions in harmful emissions. Today, tens of thousands of natural gas transit buses, refuse trucks, and freight trucks are in service, delivering people and goods, proving that natural gas technology is commercially ready and a cost-effective solution to reducing harmful emissions. And for the past several years, the majority of fuel consumed by natural gas vehicle has been RNG. **The most recent data collected by CARB shows that 98 percent of the fuel used by natural gas vehicles in California in 2021 was RNG, providing an average carbon intensity that was negative two years in a row.**<sup>1</sup>

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<sup>1</sup> <https://ngvamerica.org/wp-content/uploads/2022/10/NGV-RNG-CA-Decarbonize-2022-FINAL.pdf>

These results would not have been possible without the support of CARB, the South Coast Air Quality Management District, and the California Energy Commission. Private businesses, California utilities, independent fuel retailers, and the U.S. Department of Energy, also played key roles in funding and nurturing the development of the natural gas technology that is available today. Private and public entities also have invested billions in building out natural gas fueling infrastructure that is available today in California. This infrastructure includes a robust network of public fueling stations placed strategically throughout the state.

Our concern with the proposed ACF rule is that it ignores these achievements and the role that RNG can play in delivering steep carbon reductions. In fact, the CARB staff report dismisses the role of RNG in transportation.<sup>2</sup> Staff thus appears intent on ensuring that electric and fuel cell vehicles are the only technological solutions that will be available to businesses, public fleets, and consumers.

In its drive to set the highest bar possible, staff appears unwilling to acknowledge the very real and lengthy legal and technical impediments presented by this rulemaking. This rulemaking represents an unprecedented intrusion into the business decisions of thousands of fleets. Moreover, the rule may be legally impermissible as rather than incentivizing market behavior, it mandates specific technological solutions available for fleet purchases. Unlike other regulations that have focused only on the sale of new technology, this rulemaking requires public and private fleets to purchase vehicles that might not be market-ready or appropriate for fleet applications. This rulemaking also is unprecedented because it implicitly requires private fleets to install fueling infrastructure while ignoring a host of relevant issues such as whether fleets have the required footprint to accommodate such necessary fueling infrastructure.

As we stated in recent comments to the U.S. Environmental Protection Agency<sup>3</sup>, we also have concerns regarding the appropriateness of EPA granting a section 209 waiver for fleet mandates, and doubt that such a mandate will survive a challenge by impacted businesses. In those same comments, we also raised questions about whether EPA can approve a waiver request for a regulation that its own analysis suggests is not cost-effective.

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<sup>2</sup> See ISOR, pp. 110, 114 – 115, and 259 – 260.

<sup>3</sup> NGV America filed comments in response to U.S. EPA's notice concerning several waiver requests by California including waivers for the Omnibus Regulation, Zero Emission Airport Shuttle Regulation, and the Advanced Clean Truck Rule. See <https://www.govinfo.gov/content/pkg/FR-2022-06-13/pdf/2022-12617.pdf> and <https://www.govinfo.gov/content/pkg/FR-2022-06-13/pdf/2022-12717.pdf>.

## 1. Requirements Under the California Environmental Quality Act and Administrative Procedures Act

The California Environmental Quality Act (“CEQA”), Public Resources Code § 21000 et seq., and California Administrative Procedure Act (“APA”), Government Code §11340 et seq., impose substantive and procedural requirements that CARB must follow when developing regulations or other programs to attain air quality standards. CEQA requires state and local government agencies to evaluate and disclose significant environmental impacts of proposed actions and to adopt all feasible alternatives or mitigation measures to mitigate those impacts. The APA requires state agencies to evaluate and disclose the economic impacts of proposed regulations and adopt the most cost-effective regulatory measures to achieve goals.

The proposed regulation does not comply with the CEQA because it does not adequately address the negative environmental impacts related to the rule’s implementation. The environmental assessment prepared by CARB acknowledges the significant secondary impacts related to mandating zero emission vehicles but does not propose steps to ameliorate these impacts. The EA considers but dismisses the availability of other alternative approaches such as a Best Available Control Technology (BACT) pathway that includes low-NOx natural gas vehicles that use RNG; this approach is ultimately dismissed despite the evidence that it would deliver significant emission reductions and ameliorate the negative impacts of the regulatory action.

The proposed rule therefore fails to comply with CEQA and APA requirements because it does not take adequate steps to ameliorate negative environmental consequences and it ignores available alternative regulatory options that would address these shortcomings.

## 2. The Applicability of EPA’s Waiver Authority to Fleet Composition Mandates

EPA cannot approve a waiver of preemption for CARB’s fleet mandates because section 209(b) of the Clean Air Act does not give California authority to regulate fleet purchases, and, even if it does extend to fleet requirements, this authority is not unchecked. The Clean Air Act authorizes EPA to grant a waiver only for regulations “for the control of emissions from *new* motor vehicles or *new* motor vehicle engines.” See 42 U.S.C. § 7543(b)(1) (emphasis added). Thus, the statute clearly authorizes EPA to grant a waiver to California for regulations aimed at reducing emissions from new vehicles at the point of sale (*see id.* § 7521(a)) while states retain *limited* authority to regulate emissions after the point of sale (*see, e.g., id.* §§ 7408(f) and 7511a). See *Engine Mfrs. Assn. v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1035 (9th Cir. 2007); *see also* Brief for the United States as Amicus Curiae Supporting Reversal at 19, *Engine Mfrs. Assn., et al. v. South Coast Air Quality Mgmt. Dist., et al.*, No. 02-1343 (U.S. Aug. 2003) [hereinafter *Engine Mfrs. Assn. Amicus Brief*] (“States retain authority to control emissions by regulating the operation and use of vehicles or by establishing emissions criteria for such vehicles once they are no longer new.”).

EPA’s Clean Air Act waiver authority does not extend to fleet purchase requirements and has not previously been interpreted to extend to fleet rules. The plain language of the Clean Air

Act reveals that, outside of certain fleet provisions expressly included in the statute (see 42 U.S.C. §7586(b)-(h)), requiring fleets to adopt certain technologies or meet specific emissions-related vehicle procurement restrictions is not within the authority of the states. The U.S. Solicitor General perhaps stated this principle most concisely on appeal to the U.S. Supreme Court:

*Section 246 and its allied provisions demonstrate the care with which Congress calibrated the Clean Air Act's provisions balancing federal and state authority over fleet vehicle emissions. That balanced structure cannot be reconciled with a reading of the Act that would allow unlimited and disparate state and local regulation of new fleet vehicle purchases. Contrary to the district court's conclusion, Section 246 and the allied provisions reflect the understanding, set out explicitly in Section 209(a), that the federal government largely occupies the field of establishing emissions criteria that new motor vehicles must meet, and States (and their political subdivisions) may regulate new fleet vehicle purchases only in accordance with EPA's oversight and the Clean Air Act's design.<sup>4</sup>*

*Engine Mfrs. Assn. Amicus Brief at 28.*

To further support the argument against a waiver of preemption, it is also important to recognize the limitations on state authority over fleet regulations as enacted as part of the Energy Policy Act of 1992. Congress clearly articulated its intention that states seeking to adopt fleet programs that diverge from statutory requirements must submit a plan to the U.S. Department of Energy, and this authority expressly emphasizes the voluntary nature of any such fleet requirements. See 42 U.S.C. § 13257(o)(2)(A)-(B).

In recognition of the framework of the Clean Air Act and the Energy Policy Act of 1992, we believe that EPA, if presented with a waiver request for the ACF rule, would be required to reject it.

### 3. The Proposed ACF Rule Implicitly Mandates that Fleets Install Infrastructure

The Initial Statement of Reasons (ISOR) for the proposed regulatory action implies that fleets will be required to either use public access fueling or install fueling infrastructure if public fueling is not available. An exemption or delay is allowed if there is a delay in the installation

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<sup>4</sup>In 2008, the U.S. Court of Appeals for the Ninth Circuit after seven years of litigation nevertheless upheld the California fleet rules at issue in *Engine Mfrs. Assn.* under the market participant doctrine—which recognizes actions taken by a state or its subdivision as a market participant as generally protected from federal preemption—that the Clean Air Act did not preempt those provisions of the California rules that directed state and local governmental entities' purchasing, procuring, leasing, and contracting decisions.

of fueling but this is not specific to public fueling.<sup>5</sup> Moreover, given the nature of electric vehicles and the likely need for some or many fleets to recharge overnight (the practicality and benefit recently having been called into question in several news articles)<sup>6</sup>, it appears that fleets will be expected to install fueling at their facilities. This assumes, without even considering cost, that: CARB has the legal authority to mandate fleets install fueling infrastructure; fleets have the necessary footprint to accommodate fueling\charging infrastructure; and, the nearby electrical infrastructure is able to support medium- and heavy-duty trucks congregated at these locations. The rule accommodates delays but does not set out the legal authority that CARB is basing its presumed authority to mandate that fleets install fueling.

And as noted above, this, too, will presumably require a waiver from EPA, and section 209 has not previously been used to mandate fueling infrastructure installation by fleets.

#### 4. The Proposed ACF Rule Does Not Provide Exemption for Costs

The ISOR includes discussion of the cost-effectiveness of the rulemaking, finding that fleets will benefit from lower operational costs despite the upfront costs of electric or fuel cell vehicles. It also projects declining acquisition costs. But it does not provide a reassessment of these findings in the future or provide an exemption for fleets if the costs of vehicles do not turn out to be in line with CARB's projections. A basic notion of fairness would suggest that if the estimates are off by a certain percentage, perhaps 20 – 25 percent, then fleets should be able to request an exemption. An overarching theme of the Clean Air Act is that technology should be technologically feasible and cost-effective.<sup>7</sup> CARB needs to establish some basic guidelines around cost and provide a process for granting exemptions to fleets if the cost of vehicles is excessive.

#### 5. The Proposed ACF Rule Should Allow Fleets that Have Invested in Low-Carbon Fuels to Continue to Use these Fuels and Low-NOx Technology So Long as Such Fuels Continue to Be Available for Purchase

We urge CARB to allow a separate pathway for fleets that have been purchasing low-NOx natural gas vehicles and using low-carbon RNG so that they can continue to do so and that these purchase count toward compliance with the ZEV milestones, so long as they can

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<sup>5</sup> See Appendix A-2, Proposed Regulation Order Advanced Clean Fleets Regulation, High Priority and Federal Fleet Requirements (Aug. 30, 2022, release); the language highlighted here clearly indicates that fleets could be required to install their own fueling infrastructure: *Infrastructure Construction Delay Documentation. Fleet owners that utilize the Infrastructure Delay Exemption must keep and provide copies of all documents, letters, contracts, and purchase agreements used to support their request and qualifications for the exemption.*

<sup>6</sup> <https://news.stanford.edu/press-releases/2022/09/22/charging-cars-honight-not-way-go/>;  
<https://www.washingtonpost.com/climate-environment/2022/09/22/its-common-charge-electric-vehicles-night-that-will-be-problem/>

<sup>7</sup>See U.S. EPA “Setting Emission Standards Based on Technology Performance” (<https://www.epa.gov/clean-air-act-overview/setting-emissions-standards-based-technology-performance>).

demonstrate that RNG is still available and that they are using it in their fleets. CARB staff has been vocal in its view that it does not want to encourage stranded assets related to natural gas fueling. And it also has been vocal regarding its viewpoint that there are other better uses for RNG. Staff might be right, but we believe it is coming dangerously close to being autocratic in its viewpoint that it knows best. If it turns out that there are not sufficient supplies of RNG for the California transportation market, then fleets would no longer qualify for this pathway and would have to start phasing in all electric or fuel cell fleets.

The ability to continue to use RNG is particularly appropriate for businesses that operate fleets and that have made investments in RNG production or operate fleet vehicles that collect organic waste, solid waste, and recyclable materials. These businesses are contributing to meeting the statewide short-lived climate pollutant (SLCP) reduction strategy and SB 1383 requirements that local governments procure a substantial amount of recycled organic products. As California has imposed mandates for organic waste recycling including the production of biogas, there continues to be a need for RNG to remain an option for ACF compliance.

## 6. Support for Coalition Letter

NGVAmerica in addition to offering the above comments has also signed onto to an industry and coalition letter.<sup>8</sup> We want to recognize and support the many other issues raised in that comment letter including remarks about commercial availability or unavailability. We agree that the current proposal needs a lot more work and thought given to what it means for a technology to be commercially available, and we support the recommendations made in the group coalition letter.

## Conclusion

NGVAmerica has significant concerns about both the practicality and legality of the proposed ACF rule. If we are wrong about the potential legal hurdles that must be overcome, then it is our strongest desire that CARB incorporate the recommended changes that we and many other organizations have put forward to improve the future direction of this rulemaking effort. Without these changes, we believe this rule will fail and CARB in one or two years will be forced to acknowledge that it must reverse course.

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<sup>8</sup> See ACF Coalition Letter to The Honorable Liane Randolph (Oct. 17, 2022) (submitted electronically by Ryan Kenny, Clean Energy. NGVAmerica joined with 41 other organizations on this coalition letter.