Written Record Only

Jake Levine
18-7-5

MJB & A COVINGTON

September 28, 2018

Hon. Mary D. Nichols, Chair
California Air Resources Board
1001 I Street
Sacramento, CA 95814
(Delivered by hand at the Public Hearing)

Re: Proposed Amendments to the "Deemed to Comply" Provision for the LEV III Greenhouse Gas Emission Regulations for Model Years (MY) Affected by Pending Federal Rulemakings

Dear Chair Nichols:

These comments are submitted on behalf of the listed companies[1] in response to the California Air Resources Board ("ARB") "Proposed Amendments to the Low-Emission Vehicle III Greenhouse Gas Emission Regulation." Our companies provide advanced transportation solutions, including shared and autonomous mobility, and operate and manage electric and natural gas generation, transmission, and distribution systems across the U.S. Due to the nature of our businesses, we have become increasingly involved in the planning for, and deployment of, electric vehicle charging infrastructure.

We are committed to reducing greenhouse gas ("GHG") emission and other air pollutants to advance federal, state, and regional programs and goals, including those required under the Clean Air Act. As some of us previously commented,[2] we support a consistent national program that meaningfully reduces GHG emissions and provides a long-term investment signal for clean energy technologies and infrastructure. Based on our companies' experience, we know we can continue to make investments in clean energy and advanced transportation and mobility solutions, while creating new jobs; expanding economic opportunities; improving electric system efficiencies, reliability, and quality of service for communities and consumers; and enhancing the livability of our cities.

We also support California's work to maintain the current stringency of the federal fuel economy and GHG emission standards, support its waiver authority under the Clean Air Act, and support Section 177 States' abilities to implement California's standards. The existing federal standards are in line with the settled expectations of the parties that negotiated them (the Environmental Protection Agency ("EPA"), the National Highway Transportation Safety Administration ("NHTSA"), the California ARB, and the automakers), as well as with the regulatory proceedings that produced California ARB's original "deemed to comply" provision, Cal. Code Regs. tit. 13, § 1961.3 (Section 1961.3), along with the Section 177 States' adoption of the same.

For the reasons set forth below, it is evident that California's "deemed to comply" provision can only refer to the federal standards as currently written, and not to any amended standards that may diminish the stringency

---

1 This letter is submitted on behalf of the following transportation, mobility, electric power companies and electric utilities: EVGo; Exelon's six utilities: Atlantic City Electric, Baltimore Gas & Electric (BG&E), Commonwealth Edison (ComEd), Delmarva Power, PECO, and Pepco; Los Angeles Department of Water and Power (LADWP); Lyft, Inc; Sacramento Municipal Utility District (SMUD); Seattle City Light; Uber; and Workhorse.

2 *See* Letter to Mary Nichols (May 31, 2018) Re: Request for Public Input on Potential Alternatives to a Potential Clarification of the "Deemed to Comply" Provision for the LEV III Greenhouse Gas Emission Regulations for Model Years Affected by Pending Federal Rulemakings.

of the emissions reductions. Nonetheless, to the extent California proposes to formally clarify this fact, we are supportive of a clarification that would ensure that, in the event that the federal standards are substantially weakened as has been proposed, our industries will continue to have the regulatory certainty needed to make investments in GHG-reducing advanced transportation technology.

First, California's "deemed to comply" provision explicitly refers to federal regulations having already been adopted, not federal regulations that may be adopted in the future. Specifically, in its present form, section 1961.3 provides that "a manufacturer may elect to demonstrate compliance with this section 1961.3 by demonstrating compliance with the 2017 through 2025 MY National Greenhouse Gas program ..." Cal. Code Regs. tit. 13, §1961.3(c). This compliance option can only apply, as the definitions section of the same regulation reinforces, to the 2017 through 2025 MY National Greenhouse Gas Program *"as adopted* by the EPA and codified in 40 CFR Part 86, Subpart S." *Id.*, §1961.3(f)(25) (emphasis added). The reference to the 2017 through 2025 MY National GHG program *"as adopted"* makes clear that the California ARB intended *that* program to be the only sufficient compliance alternative. California's standards, therefore, do not contemplate that the new standards proposed by the EPA and NHTSA in the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks 83 Fed. Reg. 42,986 (Aug. 24, 2018) ("Proposed Rule") could serve as such an alternative compliance pathway.

Second, California's regulations clearly state that the "deemed to comply" option is only available for 2017 through 2025 MY National GHG standards. However, EPA and NHTSA are now proposing entirely different standards for the MY 2021 through 2026. If EPA and NHTSA should adopt such entirely different standards for MY 2021 through 2026, then the 2017 through 2025 MY National GHG Program, as referenced by California's regulations, is no longer recognizable. On a purely facial reading of the regulation, then, section 1961.3(c) could not possibly refer to the EPA standards as amended by the Proposed Rule where such standards make such a fundamental change to the program structure itself.

Finally, even if the language of the statute were somehow deficient, several documents show that EPA, NHTSA, California ARB, and automakers only ever understood "deemed to comply" to contemplate standards that reflected the stringency of the current standards. For example, in the commitment letter to Secretary of Transportation Ray LaHood and EPA Administrator Lisa Jackson dated July 28, 2011 ("Commitment Letter"), California ARB Chair Mary Nichols stated that California ARB's action to promulgate its "deemed to comply" regulation, would be contingent on "EPA propos[ing] federal GHG standards and NHTSA propos[ing] CAFE standards for MYs 2017 and beyond *substantially as described in the July 2011 Notice of Intent, and the agencies adopt[ing] standards substantially as proposed.*" Commitment Letter, at 2 (emphasis added). The July 2011 Notice of Intent, of course, contemplated that EPA and NHTSA would "propose standards that would be projected to achieve, on an average industry fleet wide basis...54.5 mpg..." 76 Fed. Reg. 48759 (Aug. 9, 2011). California ARB reiterated this contingency in its resolution adopting the "deemed to comply" option. *See, e.g.*, California ARB Resolution 12-11 (Jan. 26, 2012) at 20 (resolving that adoption of the "deemed to comply" provision was contingent upon whether "the Executive Officer determines that U.S. EPA has adopted a final rule that at a minimum preserves the greenhouse reduction benefits set forth in U.S. EPA's December 1, 2011 Notice of Proposed Rulemaking for 2017 through 2025 model year passenger vehicles."). Thus, it was clear to all parties and stakeholders that California's "deemed to comply" provision referred to the federal standards that were eventually adopted in 2012. Indeed, California ARB formally resolved that the "deemed to comply" optional compliance mechanism was *only* available where the federal rules reflected those first set forth by EPA in 2011. Any contrary interpretation of California ARB's deemed to comply provision would betray this mutual understanding and clear intention of California ARB, EPA, and NHTSA.[3]

---

[3] This mutual understanding dates back to the original negotiated settlement between the automakers, EPA, NHTSA, and California ARB, in 2009. *See, e.g.*, Jody Freeman, The Obama Administration's National Auto Policy: Lessons from the "Car Deal", 35 Harv. Envtl. L. Rev. 343, 345 (2011) ("As part of a negotiated agreement to support this

(continued...)

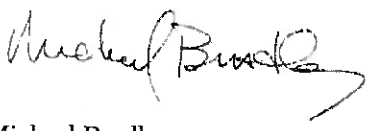
Furthermore, while California ARB acknowledged that a mid-term evaluation would indeed occur, such an acknowledgment was only made with the proviso that the ARB would be a full partner with EPA and NHTSA in reviewing the standards. *See Commitment Letter* at 3 (making California's commitment contingent upon, *inter alia*, the expectation that "California will fully participate in the mid-term evaluation"); California ARB Resolution 12-11 at 20. We agree that this was not what happened when EPA reconsidered the mid-term evaluation earlier this year, nor when EPA and NHTSA published the Proposed Rule.

Thus, the existing regulation makes clear that the "deemed to comply" provision cannot refer to any standards that are weaker than the current federal standards. Nonetheless, again we welcome California ARB's action to clarify that, if the EPA and NHTSA should finalize a rule that substantially weakens EPA's existing GHG standards, compliance with those weaker standards would no longer be available as an option for complying with California's standards.

The future of mobility is one that is shared, electric, and autonomous, and we are making investments to build the technology and services required to bring that vision to life. California has been a leader in creating a regulatory climate that fosters this innovation. The States' ability to do so is core to our Federal regulatory structure and should be nurtured, not undermined. In addition, regulatory stability, which creates market certainty, is essential to supporting the growth of new, strong industries. Given the lead time necessary for investment in research and development and eventual deployment of new technologies, regulatory certainty is needed to facilitate capital flows required to meet future challenges and opportunities. The economic benefits of advanced, clean transportation are self-evident; electric vehicle manufacturing alone (to say nothing of the promise of shared and autonomous mobility) already supports more than fifty-thousand jobs in California and contributes billions of dollars of investment into the State's economy. Therefore, protecting the promise of maintaining the current standards, and underscoring California's authority to continue innovating around clean air and transportation (including Section 177 States' authority to adopt such innovation into their own codes), is paramount.

For all of these reasons, we strongly support California ARB's efforts to maintain the current standards, and to maintain its authority, as enshrined in federal Clean Air Act, to adopt and implement California standards that continue to keep America's economy safe and secure.

Sincerely,



Michael Bradley
M.J. Bradley & Associates

Jake C. Levine, California Bar #304939
Kevin Poloncarz, California Bar #211434
Gary S. Guzy
Covington and Burling LLP

---

program, all the major foreign and domestic auto companies signed letters of commitment promising not to challenge the new standards in court, *provided that the final rule was substantially similar to the one described in the NOI.*") (emphasis added).