



To: Jack Kitowski
Tony Brasil
Craig Duehring
Paul Arneja

Cc: Richard Corey
Steve Cliff

Transmitted Via e-mail

Re: Comments on Proposed Fleet Reporting Requirement

June 13, 2019

Dear Mr. Kitowski,

We the undersigned, including the BlueGreen Alliance, Union of Concerned Scientists, Sierra Club California, California Teamsters Public Affairs Council, Natural Resources Defense Council (NRDC), California Environmental Justice Alliance (CEJA), EarthJustice, Environmental Health Coalition (EHC), Los Angeles Alliance for a New Economy (LAANE), Strategic Concepts in Organizing and Policy Education (SCOPE), Center for Community Action and Environmental Justice (CCAIEJ), Warehouse Workers Resource Center (WWRC) respectfully submit these comments on the anticipated fleet reporting requirement.

This reporting requirement must prepare the State to convert heavy-duty fleets to zero-emission technology in an orderly manner, and CARB must collect all needed information for that task—including data on contract trucking operations, employee misclassification, and asset risk. These concerns are integral to our goal of timely fleet rules achievable on the current projected schedule, and widespread, equitable electrification of California's heavy duty fleets.

We support staff's asserted need for this requirement. Effective rules for a vast and complex industry require sound industry assumptions. Assumptions in turn require industry data. With the goal of orderly and equitable fleet rules in mind, however, we suggest that staff study economic dynamics so far unaccounted for in CARB rulemaking. Collecting and analyzing this information now will ensure timely implementation of zero-emission truck standards without delays.

We respectfully recommend that CARB study vehicle asset risk and management patterns in California trucking. CARB should study key determinants of asset risk with potential to impact fleet technology transitions—including contracting patterns across sub-segments; economics of asset and non-asset fleets; truck leasing practices; contractor finances, and extent of employee misclassification. These practices determine the economics of fleet transition, technology adoption, and investment risk in clean trucks.

Issue Background

Federal deregulation of the trucking industry in the 1980s initiated a downward trajectory for industry stability and worker outcomes. In this transition, carriers began shifting capital and operating costs to low income truck drivers through contracting, re-assigning risk to precarious agents to compete and raise profit in a destructively competitive market.¹ This risk transfer to drivers created fundamental barriers to new technology adoption, as corroborated by numerous industry, government, academic, and other studies over many years.^{2, 3, 4, 5, 6, 7}

CARB actions from 2008 to 2019 tell a California specific story about the adoption barriers contracting and misclassification create. CARB's 2008 Truck and Bus Rule is perhaps the most effective state diesel emissions regulation in the US. However CARB's extensions, exemptions, and legal battles over the Rule revolve primarily around inability of contract drivers to comply, and difficulties enforcing the Rule in the contract trucking segment. CARB and the state

¹ The term "contract drivers" used in this letter describes drivers paid as independent contractors who may lease or own their own truck. This terminology refers to a carrier's method of worker classification. As discussed below, whether or not drivers are truly independent contractors is in dispute. Employee status is a legal question, and many drivers classified as "contractors" are actually employees in the eyes of the law, although their employers wrongly misclassify them as independent contractors.

² North American Council for Freight Efficiency. *Barriers to the Increased Adoption of Fuel Efficiency Technologies in the North American On---Road Freight Sector*. 2013. See page 6. Available online:

https://www.theicct.org/sites/default/files/publications/ICCT-NACFE-CSS_Barriers_Report_Final_20130722.pdf

³ US EPA Working Paper #14-02: *Heavy Duty Trucking and the Energy Efficiency Paradox*. 2014. Available online: https://www.epa.gov/sites/production/files/2014-12/documents/heavy-duty_trucking_and_the_energy_efficiency_paradox.pdf

⁴ Viscelli, Steve. *The Big Rig: Trucking and the Decline of the American Dream*. UC Press. In print. 2016.

⁵ Giuliano, Genevieve et al. *Developing Markets for Zero Emissions Vehicles in Goods Movement*. 2018. See page 2. Available online: <https://ncst.ucdavis.edu/project/developing-markets-for-zero-emission-vehicles-in-short-haul-goods-movement/>

⁶ Marin Economic Consulting. *Driver-LMC Relationships in Port Drayage: Effects on Efficiency, Innovation, and Rates*. 2014. Available online:

http://www.marineconomicconsulting.com/whitepapers/MEC_DrayageDrivers_081414.pdf

⁷ US Department of Transportation. *The Motor Carrier Efficiency Study 2007 Annual Report to Congress*. 2009. Available online: <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/MC-Efficiency-2007-Annual-Report-FINAL-March-2009-test.pdf>.

legislature confronted contracting in the following ways (among others) in rule implementation: by extending deadlines for small fleet compliance; adding \$1.2B in state-backed loans for small fleets; and imminently de-registering 50,000 commercial registrations at the end of 2019 as an enforcement backstop.

Compliance data show that fleets subject to the Rule with one to three trucks are the least compliant among all fleets. Forty percent of trucks in this segment do not comply with the Rule. The pattern holds for medium-duty trucks.⁸ The average fleet size of truck fleets out-of-compliance with the Truck and Bus Rule is two trucks.⁹

CARB attests to the difficulty of rule enforcement within the contract trucking subsector. Though contract drivers move goods for the largest retailers in the world, their business designation as contractors, and “businesses of one”, makes them difficult to track down.

Economic Barriers to Sustainable Asset Management

The primary economic dynamic driving fleet rule non-compliance in trucking is misaligned risk between carriers and contractors. Carriers create this misalignment by misclassifying workers as independent contractors.

Misclassification involves an employer engaging workers who carry out the core functions of the business, and over whose work significant control is exerted, as independent contractors instead of employees. Misclassification itself is a legal violation in California; however, businesses willfully misclassify employees as independent contractors to avoid compliance with labor standards and tax laws, which in turn places them in violation of many other state and federal laws. By misclassifying employees, companies can offload as much as 30 percent of payroll costs onto contractors and the public. ***Most importantly for environmental compliance, companies can assign responsibility for capital equipment, including truck acquisition and maintenance, to contractors instead of taking on these responsibilities themselves.***

Independent owner operators running their own business are significantly different from misclassified contractors. Contract drivers lease their services to one company over a significant period of time; do not direct their own work; do not establish business relationships with shippers, or control their workload. Across trucking segments, 97% percent of misclassification cases brought against trucking companies before the State Labor Commissioner have been resolved in the favor of employees protesting misclassification.

Misclassification leads to environmental noncompliance when contractors, with restricted access to supportive institutions and capital, struggle to purchase and properly maintain clean trucks.

⁸ 2017 CARB Compliance Report; see page I-4. Available online: https://www.arb.ca.gov/enf/reports/2017_enf_annual_report.pdf

⁹ CARB Informational Update. December 2018. Available online: <https://www.arb.ca.gov/board/books/2018/121318/18-105pres.pdf>

Despite expected savings on fuel and maintenance for electric trucks, purchase of these vehicles still comes at a premium compared to diesel that would further financially burden contract drivers.¹⁰ CARB cost estimates for electric truck Total Cost of Ownership at present also do not account for steeper financing costs incurred by contractors versus carriers, and do not account for the shorter payback on investment expected by contract drivers.¹¹

Misclassified drivers struggle to properly maintain clean diesel trucks, which cost approximately 70% more to maintain than conventional trucks.¹² EPA research suggests that mal-maintenance and tampering cause 89% greater PM emissions in cleaner internal combustion trucks than properly maintained vehicles.¹³ In addition to lacking financial capacity to pay for maintenance, contract drivers do not have adequate technical skills to keep a cleaner diesel truck in high performing condition themselves. Additionally they do not have the skills to repair electrical issues that may arise with battery electric trucks that are not covered by warranties or service agreements.¹⁴

Leasing their services to one company over an extended period of time, many contractors earn under the state minimum wage per hour, with net incomes averaging between \$28,000 and \$35,000 per year.^{15, 16, 17} These drivers struggle to finance truck loans, often finding themselves trapped in predatory arrangements, earning less than their truck loan payments.¹⁸ Whereas interest rates for truck loans to carriers may average 5%, interest rates for owner operators average 13.4%.¹⁹ Additionally, contractors must pay their own FICA and state taxes, workers compensation contributions, and work without any of the typical employment rights to overtime, sick leave, workers compensation, disability and other benefits.²⁰

The emissions and air quality impacts of barriers to technological adoption should not be underestimated. Owner operated trucks cause high toxic air pollution levels in California's most

¹⁰ CARB Advanced Clean Trucks Total Cost of Ownership Discussion Document. February 2019. Available online: https://ww2.arb.ca.gov/sites/default/files/2019-02/190225tco_0.pdf

¹¹ North American Council for Freight Efficiency. *Barriers to the Increased Adoption of Fuel Efficiency Technologies in the North American On---Road Freight Sector*. 2013. See page 25. Available online: https://www.theicct.org/sites/default/files/publications/ICCT-NACFE-CSS_Barriers_Report_Final_20130722.pdf

¹² Los Angeles Alliance for a New Economy. *From Clean to Clunker: The Economics of Emissions Control*. Available online:

<https://web.archive.org/web/20111015172945/https://laane.org/downloads/FromCleantoClunkerReport.pdf>

¹³ US EPA. *Development of Emission Rates for Heavy-Duty Vehicles in the Motor Vehicle Emissions Simulator MOVES2010*. Available online: <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100F80L.PDF?Dockey=P100F80L.PDF>

¹⁴ Viscelli, Steve. *The Big Rig: Trucking and the Decline of the American Dream*. UC Press. In print. 2016.

¹⁵ Monaco, Kristen. *Incentivizing Truck Retrofitting in Port Drayage: A Study of Drivers at the Ports of Los Angeles and Long Beach*. Metrans Transportation Center Report. 2008.

¹⁶ Erin Johanssen. 2007. *American Rights at Work. Fed Up With FedEx: How FedEx Ground Tramples Workers' Rights and Civil Rights*. <http://www.jwj.org/wp-content/uploads/2013/12/fedupwithfedex.pdf>

¹⁷ Viscelli, Steve. *The Big Rig: Trucking and the Decline of the American Dream*. UC Press. In print. 2016.

¹⁸ USA Today, *Rigged: Forced into Debt. Worked Past Exhaustion*. Left with Nothing. Available online: <https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/>

¹⁹ Proprietary Analysis conducted by BlueGreen Alliance of CARB CalCAP Loan Program funds.

²⁰ National Employment Law Project. *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*. Available online: <https://www.nelp.org/wp-content/uploads/Independent-Contractor-Costs.pdf>

pollution-burdened communities. Dirty, non-compliant trucks double our state's hazardous PM 2.5 pollution emissions from heavy duty vehicles compared to a full compliance scenario. Diesel PM also accounts for 70% of cancer risk from toxic air contaminants in California, costs California \$29 Billion annually in healthcare costs, and disproportionately burdens low income communities of color.^{21, 22}

Recommendations

CARB's reporting requirement should enable the agency to study the scale and nature of contracting operations and thereby assess asset risk across trucking segments in California.

CARB should ensure that the universe of employers assessed through the reporting requirement includes non-asset based fleets and fleets with significant contractor workforces.

CARB can identify these fleets using Franchise Tax Board data (as recommended by staff) paired with NAICS code identifications and other information identifying a company as a trucking broker, third party booker, or non-asset carrier. TRUCRS and SmartAudit data, reports, and field expertise should inform staff's research process to identifying non-asset carriers. CARB may also identify contractors by matching the following criteria in registration databases: registered owners with one truck, and with a different name on the DOT registration from the Motor Carrier registration. For instance, the DOT might be registered under Jane Doe and the MCR registered under ABC Trucking Inc. This would be a contracted owner operator.

In identifying fleets, and profiling the number of trucks under a fleet's control, CARB should identify trucks under company control by pairing VIN and DOT identification numbers. This may be done in the following way: if ABC Trucking Inc. states that only 1 truck operates under its control in state reporting data, but the entity's FMCSA entry lists 150 trucks operating under the DOT#, then staff will know ABC contracts 150 drivers.

CARB should require that any trucking company identified for reporting submit the VINs for the trucks they own and the VINs operating under the company's DOT#.

CARB should enter into an information-sharing MOU with the California Department of Industrial Relations and the Employment Development Department to collect findings of driver misclassification.

CARB should require that any trucking company identified for reporting describe the extent to which they utilize contractors. All questions asked about company owned vehicles should also be asked about contractor owned vehicles *when contractors lease their services to the company in question*. These questions include: make, model, weight class, model year, year added to fleet, body type, odometer reading, own/rent/lease, duty cycle, weight/volume limited, where parked overnight, on-site vs. off-site fueling, and maintenance. Idling should also be included, as

²¹ CARB Informational Update. December 2018. Available online: <https://www.arb.ca.gov/board/books/2018/121318/18-105pres.pdf>

²² Union of Concerned Scientists. Inequitable Exposure to Air Pollution from Vehicles in California. Available online: <https://www.ucsusa.org/sites/default/files/attach/2019/02/cv-air-pollution-CA-web.pdf>

companies know how much each vehicle idles. All vehicles should be identified as contractor owned or company owned.

Key reporting questions specific to contractors for each company should include the following:

- 1) Among all trucks operating under the Company, how many are operated by drivers who are classified as employees (with a W-2 form) and how many by drivers who are classified as contractors (with a 1099 form)?**
- 2) Among all loads carried by the Company, how many are carried by employees and how many by contractors?**
- 3) By load type, what number and percent of loads are carried by contractors and by employees?**
- 4) What percentage of company costs do contracted worker labor costs represent?**
- 5) What percentage of company revenues do earnings from services rendered by contracted workers represent?**
- 6) How many contractors lease vehicles from the Company? What are the terms and interest rates of these leases?**
- 7) What is the rate of employee turnover year-over-year at the Company?**
- 8) What is the rate of contractor turnover year-over-year at the Company?**
- 9) Has the Company been found to be in violation of any labor, employment, or tax laws in the past five years? If so, disclose for each: nature of violation; date; case number; whether terms of order were satisfied; outcome of case.**

Thank you for your consideration.

Sincerely,

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