



October 2, 2009

Via Electronic Submission: www.arb.ca.gov

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

Re: Notice of Public Availability of Modified Text and Availability of Additional Documents for the Regulation to Reduce Greenhouse Gas Emissions From Heavy-Duty Vehicles; Fifteen Day Comment Period

Dear Members of the Board:

The Engine Manufacturers Association (“EMA”) hereby submits its comments on certain modified text and the additional documents for the “Regulation to Reduce Greenhouse Gas Emissions From Heavy-Duty Vehicles” (“HDV GHG Regulation” or “Regulation”) that the California Air Resources Board (“ARB” or “Board”) made available on September 17, 2009.

Pursuant to the notice, ARB is soliciting comments on the modified text of the Regulation and on two documents that support the rulemaking: Interim Requirements to Determine Eligibility of SmartWay Tractors, EPA-420-F-09-045, August 2009 (“Interim SmartWay Eligibility Requirements” or “Interim Requirements”); and, Interim Test Method for Verifying Fuel-Saving Components for SmartWay: Modifications to SAE J1321, EPA-420-F-09-046, August 2009 (“Interim SmartWay Test Method” or “Interim Test Method”).

EMA is a trade association that represents the world’s leading manufacturers of heavy-duty on-highway engines and vehicles. EMA’s members manufacture class 7 and class 8 heavy-duty tractors, including those permitted to use the SmartWay mark by the United States Environment Protection Agency (“EPA”), which are the long-haul sleeper-cab vehicles impacted by the *Tractor Requirements* section of the proposed Regulation. See, 17 CCR § 95301(a).

I. BACKGROUND

The California Global Warming Solutions Act of 2006 (AB 32) required ARB to publish a list of discrete early action greenhouse gas emission reduction measures. See, Cal. Health & Safety Code § 38500 et seq. ARB identified “SmartWay Truck Efficiency” as one of those measures that, by January 1, 2010, must be promulgated as an enforceable regulation. In proposing that measure for regulation, ARB assumed (wrongly, as we explain below) that EPA’s voluntary SmartWay Transport Partnership (“SmartWay”) would provide a reasonable method of certifying heavy-duty sleeper-cab tractors. Subsequently, ARB proposes incorporating

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SmartWay certification as the exclusive method by which a tractor may comply with the HDV GHG Regulation, with the following modified regulatory text:

95303 Requirements and Compliance Deadlines.

(a) Tractor Requirements

(1) Except as provided in subsection 95305, Exemptions, beginning January 1, 2010, no 2011 or subsequent model year sleeper-cab HD tractor pulling a 53-foot or longer box-type trailer shall operate on a highway within California unless such tractor is a U.S. EPA Certified SmartWay Tractor. (17 CCR § 95303(a)(1)).

EPA awards SmartWay certification to certain tractor models that it determines meet a set of “technical specifications.” Those “technical specifications” contain only three requirements. A tractor can be SmartWay-certified if it has (i) certain unqualified aerodynamic equipment, (ii) EPA-verified low rolling resistance tires, and (iii) a model year 2007 or later engine. The specifications also encourage, but do not require, the use of certain light-weight wheels. Finally, the specifications require that manufacturers offer an idle reduction system as an available option on SmartWay tractors, but they do not require that the manufacturers actually install them.¹

On December 11 - 12, 2008, the Board held a public meeting where it reviewed the proposed HDV GHG Regulation and heard extensive testimony from interested parties. During that meeting the Board found the tractor certification method to be insufficient by noting “the lack of scientific credibility or measurement with the [tractor] part of the SmartWay[] Program.” Cal. ARB Meeting Transcript, Dec. 12, 2008, at 245. Afterward, the Board issued the following resolution regarding that deficiency:

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to modify the regulatory language or take other appropriate steps to ensure the regulatory requirements specified in *section 95303(a)(1) for certification of tractors will take effect only if the U.S. EPA modifies the existing U.S. EPA Certified SmartWay Tractor certification requirements to establish new performance-based test requirements* that will provide for comparable greenhouse gas reductions for similar certified SmartWay tractors from different manufacturers (ARB Resolution 08-44, Dec. 12, 2008.) (Emphasis added.)

After the Board found the then current SmartWay certification method insufficient for its regulatory purposes, EPA released new, Interim SmartWay Eligibility Requirements on August

¹ US EPA Certified SmartWay Mark License Agreement, Technical Specifications & Requirements, and Graphics Standards & Usage Guide for Tractor & Trailer Manufacturers, http://www.epa.gov/smartway/transport/documents/smartway-tractor-trailer-license-agreement_2009.pdf

17, 2009. Those new eligibility requirements incorporate by reference the Interim SmartWay Test Method.

ARB now proposes to retain the Regulation's existing tractor certification method because of the new Interim SmartWay Requirements and Test Method. However, the Interim Requirements do not establish new performance-based test requirements as the Board properly required before moving ahead with the implementation of section 95303(a)(1). EPA's SmartWay certification still lacks an objective, verifiable procedure that the Board noted was necessary for its regulatory program.

II. THE MODIFIED TEXT AND ADDITIONAL DOCUMENTS DO NOT REMEDY THE REGULATORY DEFFICIENCY NOTED BY THE BOARD

A. The Interim Requirements do not modify the existing SmartWay tractor certification requirements.

The Interim SmartWay Requirements have extremely limited relevance. They only apply to future tractor models that are "newly introduced into commerce." See, Interim Requirements, at 1. Heavy-duty tractor models often remain in production for decades, and manufacturers typically introduce a new tractor model only every five to ten years. As such, the Interim SmartWay Requirements will have very limited use.

Since they do not apply to the fourteen tractor models that already are U.S. EPA SmartWay certified, the Interim Requirements fail to provide the performance-based test requirements that the Board identified as lacking in the existing requirements. Instead, the Interim Requirements only apply to new tractor models that manufacturers may introduce in the future and wish to add to the list. Those will be very few in number. Thus, the current list of models that are SmartWay certified will not change for some time, and there is not yet any method by which the performance of those existing tractors can be verified.

B. The Interim SmartWay Requirements are ultimately subjective and not performance-based.

Much of the subjective, and therefore not verifiable, criteria in the existing SmartWay "technical specifications" are retained in the new Interim Requirements. By requiring as a condition of certification that a tractor have an "[a]erodynamic profile (sloped hood, curved features)," and that "[n]o 'classic-style' tractors (long nose, flat hood, flat, squared-off grill) will be considered eligible even if they meet other requirements," the Interim Requirements are still ultimately subjective. See, Id. In the absence of any regulatory, or even technical or scientific, definition of such design elements, a tractor's SmartWay eligibility remains in the eye of the beholder.

C. The Interim SmartWay Test Method will not verifiably measure performance.

The Interim Requirements establish that, to receive SmartWay certification, a new tractor model must be demonstrated to "meet[] or exceed[] the fuel efficiency performance of at least

one current SmartWay-certified [] tractor model.” Id. at 2. Even though the Interim Procedure purports to provide a “performance requirement,” that performance is merely an illusion. The performance here simply is that the tractor must be better than an unverified, arbitrarily certified model.

The newly released Interim Requirements do not apply to the existing SmartWay certified tractor models and even as applied to prospective tractor models, are not performance-based. As such, those Interim Requirements do not meet the requirements set forth by the Board in its resolution. ARB should continue to hold in abeyance the requirements in section 95303(a)(1) until such time as an appropriate performance-based tractor certification method is established.

III. EPA’S SMARTWAY TRACTOR ELIGIBILITY REQUIREMENTS ARE NOT APPROPRIATE FOR A REGULATORY PROGRAM

The Interim Requirements and Interim Test Procedure are iterative developments of the voluntary SmartWay Transport Partnership. By providing a slightly more objective method of certifying prospective tractors than there was with certifying existing tractors, EPA provides some improvement to its successful SmartWay program. As we stated in our earlier comments on this rulemaking, one of the hallmarks of the SmartWay program has been the changing and expanding list of measures and factors that allow shippers and carriers to tailor flexible SmartWay criteria to their unique operations. The Interim Requirements and Test Method are part of the continuous improvement and evolving framework that have made the voluntary SmartWay program flourish.

That flexible certification method works well for a voluntary program; however, it falls short of the clarity and verifiability needed for a mandatory regulation. The existing SmartWay tractor certification requirements, even with the new Interim Requirements for new models, are inappropriate for a regulatory program.

IV. THE TRACTOR CERTIFICATION REQUIREMENTS DO NOT PROVIDE ADEQUATE DUE PROCESS

The SmartWay Interim Requirements and Test Method were developed and published outside the notice and comment strictures that would be required for a mandatory program. See, 5 U.S.C. § 500 *et seq.* As such, EPA did not provide public notice that it was proposing the new Interim Requirements. EPA did not provide the public with the opportunity to review and comment on its proposal. And, EPA did not consider any public input before it finalized the requirements. And, presumably, EPA also can unilaterally change the requirements without notice or opportunity to comment.

By linking critical certification requirements of its proposed HDV GHG Regulation to one element of a voluntary program that was developed without fundamental due process and that can be changed without due process, ARB is ignoring the rulemaking requirements in California’s own Administrative Procedure Act (“Act”). See, Cal. Gov’t. Code § 11340 *et seq.* A tractor manufacturer’s product may comply with the Regulation only if it is awarded

SmartWay certification, which is subjective, flexible, and subject to change without notice. Consequently, the *Tractor Requirements* altogether fail to provide the clarity the Act requires “so that the meaning of regulations will be easily understood by those persons directly affected by them.” See, Id at § 11349.1(a)(3).

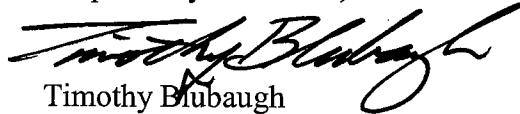
ARB should suspend the section 95303(a)(1) until a method is established that provides procedural controls appropriate for regulatory certification.

V. CONCLUSIONS AND RECOMMENDATION

By not providing a performance-based method for certifying existing SmartWay tractors, the proposed HDV GHG Regulation does not address the clear direction of the Board. The SmartWay certification method, including the new Interim Requirements for new models, may be sufficient for a voluntary program; however, it is inappropriate for a regulatory program. The HDV GHG Regulation fails to provide fundamental due process by linking its tractor certification to the informal requirements of the voluntary SmartWay program.

For the reasons set forth above, EMA urges ARB to suspend section 95303(a)(1) of the proposed HDV GHG Regulation until a sound and verifiable tractor certification method is legally developed and incorporated into the Regulation.

Respectfully submitted,



Timothy Blubaugh