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Arnold Schwarzenegger
Governor

May 15, 2006

Mr. Robert Doyle
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Office of Transportation and Air Quality
United States Environmental Protection Agency
1310 L Street, NW, Room 318
Washington, DC 20005

Dear Mr. Doyle:

RE: RESPONSE TO COMMENTS RECEIVED FROM PARTIES OPPOSING CALIFORNIA'S REQUEST FOR AUTHORIZATION OF "AIRBORNE TOXIC CONTROL MEASURE FOR IN-USE DIESEL-FUELED TRANSPORT REFRIGERATION UNITS AND GENERATOR SETS" PURSUANT TO CLEAN AIR ACT SECTION 209(e)(2)

This letter is submitted by the California Air Resources Board (ARB or Board) in response to comments received from parties opposing the request that the United States Environmental Protection Agency (U.S. EPA) authorize California to adopt and enforce its airborne toxic control measure (ATCM) for in-use diesel-fueled transport refrigeration units and generator sets (TRUs).¹ This letter responds specifically to comments submitted by the American Trucking Association (ATA), Truck Renting and Leasing Association (TRALA), Owner-Operator Independent Drivers Association, Inc. (OOIDA), and California Trucking Association (CTA).

Criteria for Granting Authorization

What are beyond dispute in this proceeding are the criteria that the Administrator of U.S. EPA must apply in granting or denying an authorization request. The Clean Air Act (CAA) is clear that

[T]he Administrator shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the

¹ ARB apologizes for the delay in submitting this response and respectfully requests that U.S. EPA accept this submission. The delay is primarily attributable to the departure of the section manager who directed development of the ATCM and the medical unavailability of the lead person that has worked on the ATCM since day one.

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website: <http://www.arb.ca.gov>.

California Environmental Protection Agency

aggregate, at least as protective of public health and welfare as applicable Federal standards. No such authorization shall be granted if the Administrator finds that –

- (i) the determination of California is arbitrary and capricious,
- (ii) California does not need such California standards to meet compelling and extraordinary conditions, or
- (iii) California standards and accompanying enforcement procedures are not consistent with this section. (CAA section 209(e)(2)(A) [emphasis added].)

California's Determination Was Not Arbitrary and Capricious

The California determination that the Administrator must consider and find to be arbitrary and capricious for the purpose of denying an authorization request is limited to California's finding of protectiveness – did California properly determine that its adopted standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards? As discussed in the initial request for authorization, there can be no contesting that the determination was properly made. The simple fact is that under section 213 of the CAA, U.S. EPA cannot adopt in-use emission standards for nonroad engines. As recognized in *Engine Manufacturers Association v. U.S. EPA*, (D.C. Cir. 1996) 88F.3d 1075, 1090-1091, Congress provided California with sole authority to adopt in-use emission standards for nonroad engines.

OOIDA argues, without support, that the Administrator's authorization review of whether California acted arbitrarily and capriciously in adopting the TRU ATCM extends beyond the protectiveness determination. As stated, the CAA is clear as to the scope of the Administrator's purview. (See *Motor and Equipment Manufacturers Association v. U.S. EPA* (D.C. Cir. 1979) 627 F.2d 1095, 1111 (*MEMA I*) and *Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards (Final 209(e) Rule)*, 59 Fed.Reg. 36969, 36982.)

In any event, even if the determination under review were broader than the protectiveness determination that the Administrator must consider, the burden would be on OOIDA and others opposed to the authorization to show by clear and compelling evidence that California's actions were arbitrary and capricious. (*MEMA I*, 627 F.2d at 1122.) OOIDA has not done this. None of the parties dispute California's determination that at least 25 percent of TRU operations and diesel PM emissions) in the state comes from out-of-state TRUs. They also do not dispute, ARB's findings that diesel PM is a toxic air contaminant and that exposure at and near facilities where TRUs operate lead to a greater risk of cancer and other maladies.

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Compelling and Extraordinary Conditions

Contrary to well-established precedent, OOIDA contends that under the second criterion ARB must demonstrate the need for the TRU standards because of the compelling and extraordinary conditions confronting California. The burden is not on California or ARB, but on those who oppose the authorization request. (*MEMA I*, 627 F.2d at 1121.) Moreover, U.S. EPA has held in both the motor vehicle and nonroad context:

Under this criterion, EPA's inquiry is restricted to whether California needs its own motor vehicle pollution control program to meet compelling and extraordinary conditions, and not whether any given standards are necessary to meet such conditions. [fn] As to the need for the particular standards which are the subject of this decision, California is entrusted with the power to select "the best means to protect the health of its citizens and the public welfare." [fn] (*California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption; Decision (OBD II Waiver)* 61 Fed.Reg 53371 (October 11, 1996), Decision Document, at 34; *California State Nonroad Equipment Pollution Control Standards; Waiver of Federal Preemption; Decision (Utility and Lawn and Garden Authorization)* 60 Fed.Reg. 37440 (July 20, 1995), Decision Document, at 29.)

Here, having presented no evidence that California does not have a continuing need for its nonroad equipment program to meet compelling and extraordinary conditions in California, OOIDA has failed to meet its burden.

Consistency with Section 209

In the *Final section 209(e) Rule*, U.S. EPA stated that in reviewing consistency with section 209, it would consider whether the California regulation was consistent with sections 209(a) and (e)(1) and that the regulation could not apply to motor vehicles preempted under section 209(a) or nonroad engines under 175 horsepower used in farm and construction equipment, or locomotives and locomotive engines that are preempted under section 209(e)(1). (*Final section 209(e) Rule*, 59 F.R. at 36982.) It also concluded that the regulation must be consistent with section 209(b)(1)(C), which provides that a regulation must be consistent with CAA section 202(a). (*Id.*, at 369683.) U.S. EPA has long held that consistent with section 202(a) means that (1) there is sufficient lead time to permit the development of technology necessary to meet the requirements, giving appropriate consideration to the cost of compliance within that time

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frame and (2) that the regulated person could meet both federal and state requirements with one test vehicle or engine. (*Id.*)

ATCM Provides Various Compliance Options; Retrofit Technology Is on Schedule to be Available by 2008

Those opposed to the authorization have challenged only the technical feasibility aspect of the consistency criterion. To date, ARB has submitted detailed information to U.S. EPA on the technical progress that is being made to verify diesel emission control strategies (DECS) that comply with the in-use emission standards set forth in the TRU ATCM. ARB continues to review several applications for verification that have been submitted and fully expects that Level 2 and 3 DECS will be available by 2008.

ATA and the California Trucking Association (CTA), however, argue that the ATCM is nothing but a scrappage regulation, in large part because aftermarket diesel emission controls are not feasible in the time provided under the regulation. (ATA comment at pages 10 and 35; CTA comment at page 1.) ATA further asserts that owners and operators of TRUs are faced with only two options: they must retrofit TRUs with emission reduction equipment for which technology does not currently exist, or replace the TRUs with new engines or a totally new system. (ATA comment at page 7.) ATA also states that ARB incorrectly presumes, contrary to findings by U.S. EPA, that emission control technology will be available for pre-2002 model year engines, which do not have "electronic fuel ignition" systems. Finally it contends that ARB, in adopting the TRU ATCM, disregarded findings by its own portable engine ATCM staff, the Engine Manufacturers Association, and others that technology will not be available in time for compliance because TRU engines operate at exhaust temperatures that will not permit the use of passive regeneration diesel particulate filters (DPFs). (ATA Comments at pages 10-11, 37-38, 40, and 43.)

Contrary to the commenters, the ATCM provides owners and operators with various options to comply with the regulation. As set forth in previous submissions, ARB fully anticipates that aftermarket technology will be verified in time for compliance with the regulation. As an alternative, owners and operators may indeed elect to comply with the regulation by using a new engine or new TRU system that meets the appropriate in-use performance standards. Or, the owner or operator may instead elect to delay compliance by purchasing an engine newer than the one presently owned and operated (but that is not new) that is not due for immediate compliance under the ATCM. For example, an owner of a pre-2002 engine may decide in 2008 to purchase a 2005 engine, which would delay the need for compliance with the low emission TRU engine standards until 2012. The owner or operator may also choose to use any one of several "alternative technologies" (e.g., electric standby, cryogenic temperature control systems,

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alternative fuels, alternative diesel fuels, or fuel cells) to comply with the ultra low emission TRU engine standards.

ATA's assertion that aftermarket emission control technology will not be available in 2008 for pre-2002 model year engines, which do not have electronically controlled ignition systems, is unsupported. ARB believes ATA meant to say that pre-2002 engine do not have electronically controlled fuel injection, and this is correct. Even today small TRU engines do not use electronically controlled fuel injection. But, as presented in ARB's February 22, 2006 comment letter, a survey of developing aftermarket technologies shows that many emission control strategies for TRU engines do not require electronically controlled fuel injection. Instead, designs are using close coupled, insulated intake throttling to raise exhaust temperatures. These technologies continue to be reviewed under ARB's diesel verification procedures.

ATA has further mischaracterized developments in DPF technology. While passive regeneration DPF systems may not be ideal for TRU engines because of their low exhaust temperatures, active regeneration DPF systems appear to be a viable option. In fact, all of the known development work being done to date on DPF systems for TRUs has focused on active regeneration techniques. (See description of active regeneration developments in ARB's earlier submissions; as described therein, demonstrations of active DPF systems in the field have been successful.)

ATA has inappropriately extrapolated ARB staffs' conclusions regarding passive DPF systems to all DPF strategies. In the *Initial Statement of Reasons for ATCM for Diesel-Fuelled Portable Engines* (January 2004), ARB staff's discussion was mistakably limited to passive DPF systems. It concluded:

Based on the exhaust test results, the ARB cannot recommend the use of a passive DPF for all portable diesel engines because in many cases the duty cycle of an engine may not reach the minimum temperatures required for a passive DPF to perform its function. If an operator decides to use a passive DPF, an engine exhaust temperature study is highly recommended to determine if the average engine exhaust temperatures for individual engines do met the minimum requirements for a passive DPF.

Beyond the narrowness of the above finding, staff's general conclusions regarding portable engines as a whole cannot be readily inferred to the specific class of TRU engines. First, the portable equipment category includes many different engine applications produced by many different engine and equipment manufacturers. As a result, duty cycles and engine characteristics vary widely. In contrast, the TRU ATCM is

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limited to only the TRU engine application of which 99 percent of all engines produced for the American market are manufactured by just two engine and two equipment manufacturers. Consequently, the universe of variables to consider when designing a DPF for a TRU is not as challenging as for the general portable equipment classification. Second, in their respective final tier 4 non-road/off-road regulations, U.S. EPA and ARB adopted a 4-mode TRU test cycle that is more representative of how TRU engines actually operate. Previously, the test cycle used for TRU engines was an 8-mode test that included 4 modes that TRU engines never operate at. This new test cycle will make it easier for control-device manufacturers to design and test DPFs for the TRU application and may result in more reliable and cost-effective control devices.

In raising technology concerns, ATA raises a red herring issue in arguing that the ATCM gives TRU and engine manufacturers every incentive not to develop the necessary technology to meet the in-use emission standards. ATA contends that because owners and operators would be required to purchase new engines and replacement TRUs to meet the ATCM requirements if retrofit technology is not available, their interest would be in seeing the technology not be developed because they would reap the benefit of selling more new TRU engines and systems.

ATA's argument is purely speculative. It provides no evidence to confirm its bald assertions. Contrary to ATA, TRU manufacturers have been very proactive to make sure their customers (the owners and operators of TRUs) have reliable compliance options. They have been very involved in working with aftermarket DECS manufacturers in making sure that proposed technologies will work with their products. (See ARB February 22, 2006 comment letter and references to Thermo King and Carrier therein.) The TRU market is very competitive with Thermo King and Carrier each having approximately 50 percent of the nationwide market. As in most highly competitive fields, the customer drives the market. Both of these companies put an extraordinary level of effort into customer support, because future sales depend upon customer satisfaction and loyalty. It would be a fatal mistake for either of these companies to take a short-sighted strategy that holds their customers hostage by trying to hold back low-cost retrofit strategies in favor of selling new engines or replacement units.

To the extent that ATA implies that ARB crafted the ATCM to discourage design and development of innovative DEC technology, the implication should be rejected. Contrary to ATA, as outlined in the ARB's February 22, 2006 comment letter, ARB has helped to solicit and attain funding for the design, development, testing, and demonstration of DECS. Manufacturers continue to make progress in their effort to verify strategies; and, as stated, ARB continues to anticipate that verified DECS will be available in time for the scheduled compliance dates. ARB will continue to closely

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monitor manufacturer progress and intends to conduct technology reviews in 2007 and 2009. At that time, staff may propose changes to the ATCM if necessary.

ATCM Is Technologically Feasible, Giving Appropriate Consideration of "Cost of Compliance"

As stated, the test that the Administrator has applied in determining consistency under CAA section 202(a) is whether the regulation provides sufficient lead time to permit the development of technology necessary to meet the requirements, giving appropriate consideration to the cost of compliance. In *MEMA I*, the court found the "cost of compliance" consideration relates to the timing of development and application of standards and procedures. The Court found:

Section 202's "cost of compliance" concern, juxtaposed as it is with the requirement that the Administrator provide the requisite lead time to allow technological developments, refers to the economic costs of motor vehicle emission standards and accompanying enforcement. [citations] It relates to the timing of a particular emission control regulation rather than to its social implications. Congress wanted to avoid undue economic disruption in the automotive manufacturing industry and also sought to avoid doubling or tripling the cost of motor vehicles to purchasers. It therefore requires that emission control regulations be technologically feasible within economic parameters. Therein lies the intent of the "cost of compliance." (*MEMA I*, 627 F.2d at 1118.)

The Court made clear that the "cost of compliance" evaluation is different from a cost-effectiveness evaluation, in which U.S. EPA compares the air quality benefits that will from a regulation's implementation to the economic costs incurred by stakeholders and society at large. The latter is not to be performed as part of a waiver/authorization analysis. (See, *Id.*, at 1114, fn. 40; see also *Id.*, at 1116 ["Elsewhere in the statute, section 317, 42 U.S.C. § 7617 (Supp. I 1977), requires the Administrator to prepare an economic impact statement investigating anticompetitive concerns before taking certain prescribed actions, but a section 209 waiver is not included among these actions."])

Consistent with the Court's findings, U.S. EPA has evaluated costs in the waiver/authorization context by looking at the actual costs of compliance in the time provided by the regulation, not the regulation's cost-effectiveness. (See e.g., *OBD Waiver Decision*, at 105.) In previous waiver/authorization decisions, the Administrator has consistently looked at the compliance costs for manufacturers in developing and applying the technology, and the costs have been broken down on a cost per vehicle or unit basis. Similarly, here, the cost feature that must be considered is the cost from

development and application of the technology that has been passed on to the owner/operator of the TRU. ARB has estimated the average cost to the purchaser to be between \$2000 and \$5000. This sum is a fraction of the costs of a new TRU equipped trailer, which the ATCM does not mandate. The Administrator has made it clear that "[p]rior waiver decisions are fully consistent with [the] discussion in *MEMA I*, which indicates the cost of compliance must reach a very high level before a waiver can be denied." (*OBD II Waiver Decision*, at 106.)

As previously stated, many owners and operators will purchase complying TRUs not because of the directives of the regulation, but because of decisions made during the normal course of business, above and beyond compliance with the ATCM. The regulation effectively requires TRUs to meet more stringent emission standards after seven years of use. This replacement schedule coincides with the business practices of many TRU owners and operators, especially those engaged in long-haul operations. Because of California's geographical location, it is reasonable to conclude that the majority of out-of-state TRU carriers operating in California are engaged in long-haul services and traveling distances of more than 300 miles between points of origination and destination. For these owners and operators, many replace their TRU systems with new equipment every 5 to 7 years. (Declaration of Corey England, at 6 and statement of Frozen Food Express Industries, Inc. (Frozen Food), at 5.) These owners and operators would incur no additional costs because of the TRU ATCM. The costs incurred would be directly attributable to their existing business practices.

Even for owners who keep their TRU equipped vehicles for periods longer than seven years, only a percentage of the costs could be attributable to the ATCM. For example, Baarts Trucking, Inc. replaces its TRU vehicles every eight years. (Declaration of Larry Baarts, at 2.) At most, the cost that could be attributed to the ATCM would be approximately 12½ percent of the cost of the compliance option chosen. And, although Baarts Trucking might elect to replace the entire TRU trailer, most of this cost would be a voluntary business decision of the company, since trailer replacement is not mandated by the regulation. Moreover, in calculating the additional costs to companies like Baarts Trucking, one would have to calculate the higher residual value of the vehicles that they are replacing on the secondary market.

Although ATA and its allies maintain that many trucking companies cycle their TRU equipment over longer periods than C.R. England and Frozen Food (Declaration of England, at 6 and statement of Frozen Food, at 5), it is not clear whether they are referring to long-haul operations that travel into California from out-of-state or local or regional trucking companies that do not operate in the state. ARB would agree that some carriers have longer turnover cycles, but ARB believes that these are generally local and regional carriers that do not necessarily operate the same number of hours as

long-haul operations. TRU manufacturers and operators have informed ARB that turnover has more to do with the refrigeration unit's accrued operating hours and resultant decay in reliability and accelerated operating costs. Based on ARB staff's discussions with owners and operators, the reliability of TRUs begins to worsen at 15,000 hours and becomes a significant liability at 20,000 hours. Long haul operators accrue mileage and engine hours at high rates, some higher than others, so they reach the reliability threshold fairly quickly compared to other types of TRU operators.

As the refrigeration system reliability drops, other refrigerated trailer performance parameters also decay, affecting operating costs. For example, the refrigeration system components wear and become less efficient. In addition, vibrations and shocks caused by roadway conditions gradually break down the thermal insulation and seals in the trailer van walls and the seals in the trailer doors. As a result, the heat transfer from the ambient air and thermal radiation from the sun and roadway increases the heat load on the refrigeration system. The net result is that the TRU engine must run more in older refrigerated trailers to maintain the temperature set point. In the extreme, an older TRU may run continuously to reach set point temperature. Operating costs increase over time to the point where it is difficult to operate profitably.

Also, as the TRU's reliability drops, it becomes too risky to haul loads that are valued at up to a million dollars. TRU down time on the open road must be avoided. The carrier's service center may be days away. Emergency road service may be too late to save a load and it is expensive when provided by an outside service.

As previously emphasized in the ARB's February 22, 2006 comment letter, ARB's determination of cost-effectiveness is a policy judgment as to whether a regulation is necessary. U.S. EPA has long held that it will grant broad deference to the state in making these judgments.² In deferring to California, the Administrator must disregard ATA's claims that ARB has overemphasized the extent of emissions in California from out-of-state TRU. The claims are without basis. ATA asserts that ARB estimated that TRUs operate, on average, up to 3000 hours per year.³ This is an incorrect overstatement of the figures ARB used. ARB's emissions estimates actually used 1,465 hours per year. See TRU *Initial Statement of Reason (ISOR)*, Appx. D, Table 6. This represents the national average reported to ARB by TRU manufacturers. The cost estimates cited in the comments include a range of operating and maintenance costs. The low end of the range represents the average reported by TRU manufacturers for TRUs used for grocery distribution. The high end of the range represents the average

² 36 Fed.Reg.17158 (August 31, 1971). See also 40 Fed.Reg. 23102, 23104; 58 Fed.Reg. 4166 (January 7, 1993), Decision Document, at p. 20.

³ For interstate TRUs this would include total runtime in California and outside California.

reported by TRU manufacturers for TRUs used for food service distribution. These scenarios are used to provide a realistic range of possible compliance costs.

The C.R England declaration indicated their seven year-old TRUs have accrued an average of 13,000 hours when they turn them over. That means each of these TRUs operates an average of 1,857 hours per year. Data recently obtained from 40 TRU fleets in California through the TRU ATCM's Facility Reporting requirement indicates the average TRU engine activity for these fleets is 1624 hours per year per TRU. So, the average annual TRU engine operating time may be greater than was used by ARB in the emissions calculations for the TRU ATCM ISOR (1,465 hours per year). That would mean TRU engine emissions may be greater and therefore emission reductions may also be greater than estimated.⁴

Undisputed data indicates that approximately 25 percent of TRU emissions come from out-of-state TRUs. At any point in time, 7500 out-of-state TRU equipped are operating on California roadways. Given the toxicity of diesel PM emissions, and the high risk of harm it causes to those persons exposed, California acted reasonably in determining that emissions from both in-state and out-of-state vehicles while operating in California must be addressed.

Out-of-State TRU Owners and Operators Have Been Provided with Reasonable Notice

ATA contends that ARB has failed to provide out-of-state owners and operators of TRUs with sufficient notice of the TRU rulemaking and its intent to enforce the ATCM. It claims that the first notice that many TRU owners and operators received was on November 21, 2005 when U.S. EPA published its Federal Register Notice of California's

⁴ The TRU ATCM ISOR included discussions of TRU engine diesel PM emissions. ARB staff calculated these emissions at distribution facilities based on voluntary rough estimates obtained from about 25 facilities. Part of the TRU ATCM requires large facilities to conduct recordkeeping and reporting to provide data on TRU engine activity at distribution centers, enabling more refined calculations of emissions and public health risk. The resulting facility report data that has been submitted to ARB clearly indicates the TRU engine emissions that occur at distribution centers is greater than originally estimated in the ISOR. In addition, the TRU engine emission factors used in the ISOR estimates may be lower than actual in-use engines because the deterioration factors provided by engine manufacturers may have been inappropriately small. Staff discovered this difference after reviewing deterioration factor reports. ARB has also learned that emissions-related maintenance is not often completed by TRU owners unless they experience operating problems. ARB is now in the process of setting up dynamometer emissions testing of in-use engines. If in-use TRU engine factors are greater and TRU engine activity at facilities is greater than thought when the Staff Report estimates were made, the diesel PM emissions and public health risk near distribution centers where TRUs operate would be greater also. In-use engine testing may also indicate some TRU engine models meet the LETRU in-use performance standards.

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request for authorization. (Comments of ATA at pages 9 and 31.) ARB respectfully disagrees with ATA. The agency worked closely with all stakeholders in developing and crafting the ATCM for more than two years. ARB conducted numerous workshops and technical workgroup meetings with engine and TRU manufacturers, and owners and operators of TRUs, including their representative associations such as ATA. Indeed, consistent with ATA's mission statement that it represents and educates its members on regulatory developments that may affect its members, ATA attended and actively participated in nearly all workshops and workgroup meetings for the TRU ATCM. ATA also received notice of and attended and testified at both of the Board hearings in which the ATCM was considered and approved for adoption. ARB's mailing list and email list serve for the TRU ATCM includes hundreds of stakeholder names. Included on the list of persons receiving notice of the proposed regulation were the trade representatives of Mexico and Canada, who are responsible for notifying affected stakeholders in those two countries.

Additionally, on August 8, 2004, at the time that ARB submitted the TRU ATCM for final regulatory approval in California, ARB staff requested ATA's assistance in distributing a TRU ATCM outreach cover letter and Regulatory Advisory to its members. ATA rejected ARB's request that ATA send these items to their membership and also declined to provide ARB a membership listing so that it could directly send the information out. Instead ATA agreed to post a notice on the ATA Transport Topics newsletter website. On December 6, 2004, ATA's newsletter, *Transport Topics*, posted an article on their newsletter website, titled "CARB Calls for Refrigeration Units to Meet 2008 Emission Standards." This article was also published in the hardcopy version of this magazine. On November 17, 2004, ARB emailed a notice of rule adoption and Regulatory Advisory to major and minor trade associations in the U.S., Canada, and Mexico that may have members that operate TRUs or facilities where TRUs operate.

Owners and operators of TRUs should be well aware of the ATCM in that national publications have distributed numerous feature stories about the adopted regulation. For example, ATA posted an article on their truckline.com website, on or about March 3, 2004. The *Refrigerated Transporter*, the top trade journal for U.S. refrigerated carriers, with approximately 10,000 subscribers, published an article in its August 2004 entitled "California Proposes Reefer Emissions Project." The *Refrigerated Transporter* magazine published a second article in the January, 2005 edition, "State Imposes engine emission limits on reefers." *Today's Trucking* posted an Internet news article on November 29, 2004, entitled "Reefer Madness: CARB passes regs on refrigerated unit engines." The Owner-Operator Independent Drivers Association's trade journal, *Land Line*, published an article entitled, "Diesel reefers may get cold shoulder in CA" in its March/April 2005 edition.

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ARB has commenced a broad and comprehensive effort to inform all in-state and out-of-state TRU owners and operators about the TRU enforcement program, which will not commence until January 1, 2009 and after ARB obtains authorization from U.S. EPA. ARB inspectors are distributing pamphlets about the program at its inspection sites on California public roadways and on its heavy-duty vehicle inspection program website, < <http://www.arb.ca.gov/msprog/hdvip/hdvip.htm>>.

California Acted Reasonably in Applying the ATCM to Out-Of-State TRUs

As stated above, exposure to diesel PM can result in serious health risk. With 25 percent of all TRU diesel PM emissions coming from out-of-state TRUs, they are a significant contributor to the increased health risk that exposed Californians face. ATA, however, contends that ARB has not made any meaningful effort to limit the ATCM to TRUs primarily used in California or to otherwise limit the burdens imposed on out-of-state operators. (ATA Comments at pages 6 and 33.) During the course of rulemaking development, ARB staff considered a "limited-use exemption" for those operators that only occasionally operate in California. ARB dropped the proposal, however, after concluding that the exemption would require detailed – and, perhaps, overly burdensome – record keeping and reporting requirements and would be expensive to manage and difficult to enforce.

ARB assumes that by referencing a "primary-use test," ATA believes that the ATCM should not apply to vehicles that operate within California less than 50 percent of the time. To this end, ATA would argue that Certified Freight Lines, C.R. England, and Frozen Foods Express, all of which submitted declarations in support of ATA's comments,⁵ should not be subject to the regulation. These companies respectively operate in California approximately 328,000, 543,200, and 732,700 hours per year, with diesel PM emissions of approximately 4.7, 7.8, and 10.5 tons per year.⁶ These emissions are significant and undeniably harmful to the health and welfare of California residents. Upon balancing these harmful emissions and the difficulty of applying a reasonable "limited-use exemption" against the potential costs of compliance, ARB appropriately determined that all diesel TRUs should be subject to the regulation.

National TRU Shipping Practices

ATA contends that ARB has improperly advanced a hypothesis that modern truck dispatching practices and communication technologies could provide the necessary

⁵ See declarations of Jon Cramer Corey England, and David Hedgepeth.

⁶ These companies, in general operate 53-foot trailers that use 35 horsepower TRU engines that operate at an average load factor of 0.53, with an emission factor of approximately 0.70 grams per horsepower-hour after considering emissions deterioration.

tools to control portions of a fleet that would enter California. (ATA comment letter, at 26.) It further contends that contract carriers, such as C.R. England, need to be able to pick-up the "closest, next available load and be ready to take it anywhere in the country. They are thus not capable of segregating their fleets into those that travel into California and those that do not. (Declaration of England, at 2-3.) Contrary to ATA, TRU carriers have long made business decisions, including the purchase of necessary equipment that allows them to be competitive in the marketplace. For example, long haul TRU fleets must be capable of shipping different types of temperature sensitive products. Deep frozen goods (e.g. ice cream, frozen fish, and baked goods) require trailers with thicker walls, with greater thermal insulation, to achieve set point temperatures of minus 20 degrees F. On the other hand, long-haul shipments of produce, dairy products, and eggs require a set point of 35 to 55 degrees F. Fleets typically purchase trailers with thinner walls using less insulation for these types of loads. In addition, many types of produce require continuous air flow during transport to remove the ethylene gas that is generated by the produce, which accelerates ripening and decay if it is allowed to accumulate (e.g. bananas, apples, and peaches).

Typical practice is that deep frozen goods shippers specify what the required set point for the load is and the TRU carrier must send an appropriately equipped trailer. Produce shippers also specify the set point and continuous air flow requirement so that shelf life is as long as possible, and the carrier is required to send a TRU that is capable of meeting this specification. When long haul TRU fleets accept a job, they must consider whether they have equipment in a geographic position capable of meeting the shipper's specification and they do this by carefully tracking their equipment. To do this effectively and efficiently, it must be reasonably assumed that long-haul carriers are already capable of tracking and sending specification-compliant equipment. And to apply this technology to equipment that complies with California's in-use performance standards would neither be impossible nor as burdensome as ATA implies.

Fair Enforcement

ATA contends that the nature of the TRU rule is such that it will inevitably lead to arbitrary enforcement with respect to out-of-state TRUs. Unlike a regulatory requirement, such as a speed limit, with respect to which compliance is readily apparent from the operation of a vehicle, police and other enforcement authorities will not be able to identify "noncompliant" out-of-state TRUs by visual inspection or mere observation. Rather, lacking a rational framework for applying the Rule to out-of-state TRUs, enforcement authorities will necessarily resort to arbitrary stops and investigations.

Contrary to ATA's concerns, trained and experienced ARB inspectors will be solely responsible for conducting inspections under the TRU ATCM. TRU operators that come

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to California on a regular basis have the option of applying for an ARB identification number that will be stenciled to the outside of the TRU. This will speed up the inspection process, since the ARB I.D. number will tell the ARB inspector the critical information needed to determine the compliance status of the TRU engine. TRU operators will quickly learn about the benefits of having an ARB I.D. number and will be provided a pamphlet on how to apply for an ARB I.D. number.

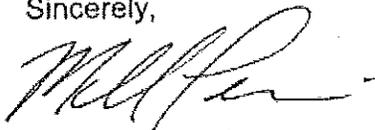
Those opposed to authorization expressed also expressed concern that it would be unfair to issue citations to and assess penalties against the owners of rental and leasing fleets since they will have no control over the renting or leasing operators of TRU-equipped vehicles. (ATA Comments at page 27; TRLA Comments at page XX.) Although the ATCM provides that both owners and operators of non-complying vehicles are subject to being cited and fined, ARB will take final enforcement action only after fully considering all relevant circumstances. As ARB has stated, rental and leasing owners may protect themselves against violations by ensuring that its rental and lease contracts make it clear that the vehicle is equipped with a compliant or non-compliant TRU engine and that, if the latter, the vehicle cannot be operated in California and the operator assumes all risk if it elects to do so.

Conclusion

For the reasons set forth above and in ARB's submittals with this request for Authorization, the Administrator should respectfully grant ARB's request for authorization to adopt and enforce the TRU ATCM. ARB believes that the authorization should be granted as expeditiously as possible since commenters, who oppose the granting of the waiver, have failed to meet their burden in establishing that sufficient evidence exists for the Administrator to deny the authorization.

If you should require additional technical information on this item, please contact Michael Terris in the ARB Legal Office, at (916) 445-9815.

Sincerely,



Michael L. Terris
Legal Counsel

cc: Dan Donohoue, Chief
Emissions Assessment Branch
Stationary Source Division