IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRUCK TRAILER MANUFACTURERS ASSOCIATION, INC., *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.* Respondents, and CALIFORNIA AIR RESOURCES BOARD, *et al.*, Intervenors.	No. 16-1430 (consolidated with No. 16-1447)

PETITIONER TRUCK TRAILER MANUFACTURERS ASSOCIATION'S REPLY IN SUPPORT OF MOTION FOR STAY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

REPLY

The Final Rule advances a novel interpretation of decades-old language in the Clean Air Act, under which an industry that has never before been subject to federal emissions laws is suddenly within EPA's regulatory reach. EPA is now reconsidering that interpretation and the Rule. EPA does not oppose a stay. Common sense dictates that trailer manufacturers should not be forced to incur irreparable costs to change their businesses to comply with regulations that this Court is likely to hold unlawful and that EPA itself is reconsidering.[1]

I. TTMA's Stay Motion is Timely

TTMA's stay motion did not violate this Court's order requiring "procedural motions" to be filed by February 22, 2017. Environmental Opp. 6. "Procedural motions are those that may affect the progress of the case through the Court." D.C. Cir. Handbook of Practice and Internal Procedures § VII.A. Motions to stay underlying agency action (unlike motions to stay the appeal) do not "affect the progress of the case through the Court." TTMA waited to seek a stay in this Court because its stay petition was pending before EPA, and EPA assured TTMA that it was considering the petition (and sought abeyances to do so). Moreover, Intervenors suggest that TTMA should have sought a stay 14 months before the

[1] TTMA lacks space to respond to every point made by Intervenors, who have circumvented the word limits by dividing up the arguments, with the States incorporating the Environmental brief on the merits and the Environmental brief incorporating the States' brief on the final two factors.

implementation deadline, but at the same time argue that irreparable harm is absent unless a member has "lost a specific sale." States Opp. 10. These positions are contradictory. TTMA appropriately sought review when it became clear EPA would not act on the stay petition, and when the harm to its members crystallized.

II. TTMA Is Likely To Prevail on the Merits

EPA lacks authority to regulate trailers, and the Intervenors' contrary argument reads the word "self-propelled" out of the statute. 42 U.S.C. § 7550(2). It is hard to imagine what item "designed for transporting … property on a street or highway" Congress intended to exclude with the word "self-propelled," other than trailers. The many contrasting statutes using the phrase "self-propelled *or* drawn by mechanical power" confirm this obvious point. Mot. 8-9. So does the express authorization to regulate "*motor vehicle engines*" in addition to "motor vehicles" in 42 U.S.C. § 7521(a)(1). That would be entirely unnecessary if the term "vehicle" itself includes anything EPA may deem "essential" to the "vehicle." Environmental Opp. 12-13; *see* Mot. 7.

Intervenors have no response at all to the "engine" language, and no persuasive response to Congress's use of "self-propelled" and omission of "drawn by mechanical power." Intervenors incorrectly describe the statutes using the "drawn by mechanical power" language as "far afield" "criminal" or "property" statutes, when in fact three of the statutes authorize the Department of

Transportation to issue on-road safety standards. Mot. 8 (citing 49 U.S.C. §§ 30102(a)(7), 32101(7), 30301(4)). These statutes signal that Congress did not authorize EPA to issue on-road emissions standards for trailers. Contrary to Intervenors' implication, Environmental Opp. 12 & n.4, this is a powerful and frequently-applied tool of construction, including in the environmental context. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (other statutes' specific reference to "indirect ownership" "instructs us that Congress did not intend" bare reference to "ownership" to cover indirect ownership); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996); *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994).

Intervenors concede that other federal courts of appeals and the United States have interpreted the phrase "self-propelled" in criminal statutes to exclude trailers, even when combined with a tractor. Mot. 11. Intervenors pivot (Environmental Opp. 13) to "purpose," but that is question-begging. "[N]o legislation pursues its purposes at all costs." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014). "Congressional intent is discerned primarily from the statutory text," *id.*, and the text—the term "self-propelled"—controls. Ironically, intervenor California Air Resources Board declares in its own emissions regulations that "trailers" are "not self-propelled" and accordingly "are not vehicles" under EPA regulations. 17 Cal. Code Regs. § 95662(a)(17)(C).

Nor are trailers "incomplete vehicles." Intervenors cite a reference in the Proposed Rule to an EPA regulation concerning "incomplete trucks." Environmental Opp. 11 (citing 80 Fed. Reg. 40,170). EPA presumably dropped this reference from the Final Rule because it *undermines* EPA's current incomplete vehicle rationale. EPA previously interpreted the Clean Air Act to permit regulation of "incomplete vehicles" in the sense of a "truck which does not have the load carrying device" attached—not in the sense of a load-carrying device without the truck attached. 40 C.F.R. §§ 86.082-2, 86.085-20, 86.1803-01 (2016). The older regulations provided that, to qualify as a vehicle or "incomplete vehicle," a product must both (1) be intended for self-propelled use and (2) "include[] at least an engine" or a "passenger compartment." 40 C.F.R. § 86.085-20 (2016). This is not a prior EPA regulation "allocating certification responsibilities for incomplete vehicles" to manufacturers of component parts (Environmental Opp. 11); it is a prior EPA regulation confirming that trailers are not motor vehicles, "incomplete" or otherwise.

Intervenors also deny that EPA's interpretation is open-ended, suggesting that trailers are not parts of motor vehicles for purposes of the provision covering "motor vehicle … part manufacturer[s]," because they are not "installed in or on a motor vehicle." 42 U.S.C. § 7550(9). If so, that just means EPA *cannot* regulate trailer manufacturers as part manufacturers, not that EPA *can* regulate trailer

manufacturers as motor vehicle manufacturers. As for Intervenors' effort to graft a limiting principle onto EPA's "incomplete vehicle" theory, trailers are no more "essential [to] enabl[ing] the vehicle to fulfill its defined purpose" (Environmental Opp. 12) than tires, wheels, engines and countless other features that may contribute to greenhouse gas emissions. EPA's theory renders every tire an incomplete vehicle.

Intervenors also argue that "tractor-trailers" are self-propelled vehicles designed for transporting property. Environmental Opp. 7-9. But TTMA's members do not manufacture "tractor-trailers." TTMA's members manufacture trailers only, and they sell those trailers to end-users like cargo shippers, motor carrier fleets, and independent owner-operators. Sims Decl. ¶ 2. It is undisputed that someone other than the tractor or trailer manufacturer typically assembles the tractor-trailer, 81 Fed. Reg. 73,516, and that trailers are typically attached to many different tractors over their useful life, Sims Decl. ¶ 3. Moreover, trailers have extensive commercial uses beyond attachment to the tractor, including for storage. *Cf.* Environmental Opp. 8. The government reports that there were 4.5 times as many trailers as tractors registered for use in the United States in 2012.[2]

[2] *See* https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/state_transportation_statistics/state_transportation_statistics_2014/index.html/chapter5/table5-1 (2,581,000 tractors); https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/state_transportation_statistics/state_transportation_statistics_2014/index.html/chapter5/table5-2 (11,701,273 commercial trailers).

Intervenors' argument that a vehicle may have more than one manufacturer under the Clean Air Act is thus simply a distraction. First, it is not true. The statutory regime contemplates a single manufacturer responsible for each motor vehicle. *See, e.g.*, 42 U.S.C. § 7522(a)(1) (prohibiting a manufacturer from selling a motor vehicle unless covered by certificate of conformity); § 7524(b) (manufacturer subject to penalty for "each motor vehicle"); § 7541(a)(1) (imposing warranty requirements on "the manufacturer of each new motor vehicle"); *id.* §§ 7541(c), (c)(3)(A), (c)(3)(C), (d), (h).[3]

Second, it is irrelevant. Again, TTMA's members do not make "tractor-trailers" and are not "engaged in the manufacturing … of new motor vehicles [or] new motor vehicle engines." 42 U.S.C. § 7550(9). Intervenors' argument that the word "engaged" somehow expands the universe of regulated manufacturers of new motor vehicles to entities that sell a separate product that a third-party attaches to a tractor has no textual mooring; reads the definition of "motor vehicle" out of the statute; makes the various certification, enforcement and warranty provisions incoherent; renders references to "new motor vehicle engines" surplusage; and would make every manufacturer of side mirrors and windshields potentially subject to EPA regulation.

[3] Footnote 86 of the Rule does not document "other instances involving multiple manufacturers" of a single vehicle. *Cf.* Environmental Opp. 11.

III. TTMA's Members Will Be Irreparably Harmed

Intervenors contend that TTMA's demonstration of irreparable injury is insufficient because it is speculative and lacks specificity. Environmental Opp. 16; States Opp. 10. To the contrary, TTMA has presented specific, concrete evidence that, absent a stay, its members will lose business and market share and will incur significant, unrecoverable compliance costs.

A. Market Impacts

Intervenors assert that, because TTMA's members sell approximately ninety percent of the trailers in the United States, TTMA is a "virtual monopoly" that cannot lose market share. Environmental Opp. 16. But TTMA is a trade association, not a corporation. It need only establish "a likelihood that irreparable harm will be suffered by one or more of its member[s]." *Air Transp. Ass'n of Am. v. Export-Import Bank of the U.S.*, 840 F. Supp. 2d 327, 336 (D.D.C. 2012).

Intervenors further contend that market data show the standards will not have any impact on sales. Environmental Opp. 17. But the market report Intervenors cite relates primarily to sales as of August 2017, well before the trailer standards go into effect. Environmental App. 59-61. Further, Intervenors' declarant misleadingly states that "there is no expectation of a disruption to the market as a result of the impending 2018 trailer standards"; yet, in a footnote,

concedes that there may be "some reluctance to commit [to orders] now" in light of uncertainty about the trailer standards. *Id.* at 61.

Moreover, TTMA has provided direct evidence of lost sales including, contrary to Intervenors' assertions, "concrete estimates regarding lost revenues, customers, [and] market share." *Cardinal Health, Inv. v. Holder*, 846 F. Supp. 2d 203, 212-13 (D.D.C. 2012). Great Dane expects to lose some or all of its annual sales to a customer that purchases approximately 200 new trailers each year, Carter Decl. ¶ 4; Kentucky Trailer has rejected orders for new trailers that do not include the mandated equipment, Gauntt Decl. ¶ 6;[4] and Utility Trailer anticipates that it will lose orders from customers that do not want to purchase trailers that contain the mandated equipment, particularly while the status of the Rule remains in limbo, Maki Decl. ¶ 9. These harms are not speculative. They are happening now.

B. Compliance Costs

TTMA's members will incur millions of dollars in unrecoverable compliance costs. Mot. 16-17. Citing a single district court case, Intervenors argue that these compliance costs are not of sufficient magnitude to constitute irreparable harm because (on Intervenors' unexplained calculations) they represent less than one percent of certain companies' annual gross revenues. Environmental Opp. 19. The comparison is apples to oranges; TTMA's declarants did not

[4] Kentucky Trailer has approximately 650 employees and well over 1,000 employees when considered together with its parent company, and so must comply on January 1, 2018.

quantify all costs stretching over an entire year. Moreover, "[w]hen determining whether injury is irreparable, it is not so much the magnitude but the irreparability that counts." *Texas v. E.P.A.*, 829 F.3d 405, 433-34 (5th Cir. 2016) (quotations omitted). As in *Texas v. E.P.A.*, "[n]o mechanism here exists for [TTMA's members] to recover the compliance costs they will incur if the Final Rule is invalidated on the merits." *Id.*

These harms are compounded by EPA's delay in certifying equipment as compliant. Mot. 10. Intervenors state that the necessary equipment is "widely available," States Opp. 2, but that does little good if EPA has not *approved* the equipment as compliant. *See* 40 C.F.R. §1037.211.[5] And the limited exemptions afforded by the Final Rule are not sufficient to bridge the gap where manufacturers cannot source compliant equipment for unique configurations that their customers request for a significant number of trailers. Carter Decl. ¶ 4.

Intervenors contend that the storage costs identified by TTMA's members are overstated, and speculate that TTMA's members have other options, such as leasing and "just-in-time" delivery. Environmental Opp. 19. TTMA's members already use these options where feasible. TTMA's members—not EPA or Intervenors—are best positioned to estimate the additional storage costs they will

[5] California's experience with its own regulations is irrelevant. States Opp. 6-9. California regulates motor carriers that purchase and use trailers; it does not regulate trailer manufacturers directly. 17 Cal. Code Regs. § 95301(a).

incur as a result of the Rule, and they project that their *actual costs* will far exceed EPA's estimates, which EPA is now reconsidering in any event.[6]

Finally, Intervenors suggest that these compliance costs are not irreparable because they "are ultimately passed onto customers, who recover the costs within six months to two years." Environmental Opp. 20; States Opp. 11. First, there is no reason to believe that TTMA's members will be able to pass along costs of equipment that its customers do not actually want. *E.g.*, Maki Decl. ¶ 9. Second, Intervenors' argument is internally inconsistent. They suggest, on the one hand, that there is strong demand for efficient trailers due to fuel savings. Environmental Opp. 17. But then, in touting the expected benefits of the Rule, they argue that motor carriers do not adequately value energy savings because of the so-called "energy paradox." States Opp. 18. Both statements cannot be true.

IV. The Public Interest Favors a Stay

The State Intervenors contend that a stay will harm the public interest because the Rule will reduce greenhouse gas emissions from combination tractor-trailers; greenhouse gas emissions contribute to global climate change; and global climate change has many dire effects. States Opp. 19. This argument is divorced

[6] Intervenors oddly characterize as "self-inflicted" harm the additional storage costs one manufacturer incurred to store 2,500 non-compliant trailers. Environmental Opp. 19 n.9. Absent the Rule, the manufacturer would have been able to meet its customer's demand without incurring additional storage costs.

from TTMA's limited request to stay the trailer standards for the duration of this litigation.

All parties agree that trailer manufacturers already install and sell aerodynamic and friction-reducing equipment on some of their trailers. Environmental Opp. 20 n.10; States Opp. 8. The potential impacts of a stay are thus limited to the segment of the market for which trailer manufacturers would not install the mandated equipment but for the Rule, because customers do not want it. As TTMA explained, Mot. 19-20, that segment comprises primarily trailers used in low-speed, short-haul operations—such as regional and city deliveries—where customers have determined that this equipment will not save fuel and will displace cargo. *Id.* TTMA should not be forced to sell and customers should not be forced to purchase equipment they do not want on the basis of a Rule that is likely to be reversed.

Any emissions reductions the Rule could achieve during the limited duration of this litigation are immaterial at best. EPA projects that the Rule—which imposes increasingly stringent emissions standards for several categories of medium- and heavy-duty trucks through Model Year 2027 and continuing for another seventy years to the year 2100—will reduce mean surface temperatures by less than 0.007 degrees Celsius. 81 Fed. Reg. 73,835. Staying just the trailer

standards for a matter of months will have a negligible impact (if any) on these projected temperature reductions.

Put simply, the nexus between (a) excess emissions that might result from a temporary stay of the trailer standards for the limited duration of this litigation and (b) the dire effects of global climate change that the State Intervenors describe in their Opposition is far too attenuated to demonstrate harm to the public interest that outweighs the immediate and tangible harms to TTMA's members.

CONCLUSION

The Court should grant the stay.

Dated: October 19, 2017

Respectfully submitted,

/s/ Elisabeth S. Theodore
Lisa S. Blatt
Jonathan S. Martel
Elisabeth S. Theodore
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, D.C. 20001
Tel: (202) 942-5000
Fax: (202) 942-5999
elisabeth.theodore@apks.com

S. Zachary Fayne
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center
San Francisco, CA 94111
Tel: (415) 471-3114
Fax: (415) 471-3400
zachary.fayne@apks.com

Attorneys for Petitioner Truck Trailer Manufacturers Association

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,590 words, excluding the parts of the filing exempted by Fed. R. App. P. 32(f). The filing complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because it was prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: October 19, 2017

/s/ Elisabeth S. Theodore
Elisabeth S. Theodore

CERTIFICATE OF SERVICE

I hereby certify that, on October 19, 2017, the foregoing was electronically filed with the Court via the appellate CM/ECF system, and that copies were served on counsel of record by operation of the CM/ECF system on the same date.

Dated: October 19, 2017

/s/ Elisabeth S. Theodore
Elisabeth S. Theodore