

June 26, 2017

VIA EMAIL AND U.S. MAIL

Mr. Scott Pruitt, Administrator
Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Mail Code: 1101A
Washington, DC 20460

Mr. Jack Danielson, Acting Deputy Administrator
National Highway Traffic Safety Administration
1200 New Jersey Ave., S.E.
Washington, DC 20590

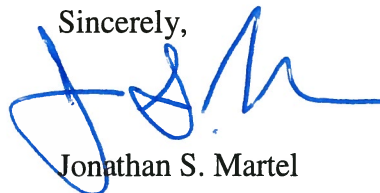
Re: Truck Trailer Manufacturers Association Petition for Reconsideration and Stay of GHG and Fuel Efficiency Standards -- Docket No. EPA-HQ-OAR-2014-0827

Dear Administrator Pruitt and Acting Deputy Administrator Danielson:

Enclosed please find the Truck Trailer Manufacturer Association's supplemental petition for reconsideration and a stay of the EPA and NHTSA final rule titled "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2." A copy of this petition has been electronically mailed to the Office of Air and Radiation Docket Center for filing in Docket No. EPA-HQ-OAR-2014-0827 and has been mailed to NHTSA's Docket Operations office for filing in Docket No. NHTSA-2014-0132.

Please contact me if you have any questions.

Sincerely,



Jonathan S. Martel

Enclosure

**BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND
THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION**

In re: Greenhouse Gas Emissions }
and Fuel Efficiency Standards for }
Medium- and Heavy-Duty Engines }
and Vehicles - Phase 2 }
_____ }

SUPPLEMENT TO PETITION FOR RECONSIDERATION AND STAY

Pursuant to Section 307(d)(7)(B) of the Clean Air Act (“CAA”)¹ and Sections 553 and 705 of the Administrative Procedure Act (“APA”),² the Truck Trailer Manufacturers Association, Inc. (“TTMA”) hereby supplements its April 3, 2017 request³ that the U.S. Environmental Protection Agency (“EPA”) and National Highway Traffic Safety Administration (“NHTSA”) (collectively, the “Agencies”) reconsider and rescind the greenhouse gas (“GHG”) and fuel economy standards applicable to heavy-duty truck trailers, as promulgated in the final rule entitled *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2*, 81 Fed. Reg. 73,478 (Oct. 25, 2016) (“Final Rule”). TTMA further requests in the interim that EPA stay the implementation date of the new GHG standards applicable to trailers, currently set for January 1, 2018.

This is the first time that EPA and NHTSA have sought to impose emissions and fuel economy standards on trailers, which by design are pulled by another vehicle and therefore emit no GHGs and consume no fuel. The Agencies should rescind these standards for the simple reason that they lack legal authority to adopt such standards. The Clean Air Act authorizes EPA to regulate “motor vehicles,” expressly defined as vehicles that are “self-propelled.” A trailer is not self-propelled. The rationale EPA offered in the Final Rule—that trailers may be regulated as “incomplete vehicles”—reads the definition of “motor vehicle” out of the statute. A “motor vehicle” that is “incomplete” because it is not “self-propelled” and requires a tractor to pull it is not a motor vehicle. Likewise, the Energy Independence and Security Act extends NHTSA’s fuel economy regulatory authority to “commercial medium- and heavy-duty on-highway vehicle[s],” defined to mean “an on-highway vehicle with a GVWR of 10,000 lbs or more.” GVWR, or gross *vehicle* weight rating, is the maximum load that can be carried by a vehicle,

¹ 42 U.S.C. § 7407.

² 5 U.S.C. §§ 553(e), 705.

³ On April 3, 2017, TTMA sent a letter to EPA Administrator Scott Pruitt and Department of Transportation (“DOT”) Secretary Elaine Chao requesting that the Agencies reconsider and rescind the GHG standards applicable to trailers. TTMA resubmitted the April 3 letter to EPA on April 13, 2017 in response to EPA’s Request for Comment on regulations that may be appropriate for repeal, replacement, or modification under Executive Order 13777, “Enforcing the Regulatory Reform Agenda.” See 82 Fed. Reg. 17,793 (Apr. 13, 2017). On June 1, 2017, TTMA sent a similar request to Jeffrey Rosen, DOT Regulatory Reform Officer, following his appointment to the position of Chairman of the DOT Regulatory Reform Task Force.

including the weight of the vehicle. Heavy-duty vehicles also have a gross *combined* weight rating (GCWR), which describes the maximum load that the vehicle can haul, including the weight of a loaded trailer. The vehicles subject to NHTSA's fuel economy authority, defined by reference to GVWR, therefore exclude trailers, and TTMA fully anticipates that the D.C. Circuit would reject a theory that allows administrative agencies unilaterally to expand their regulatory reach to products that Congress expressly excluded from regulation. Beyond that, the trailer standards are arbitrary and capricious. The Agencies employed unrealistic assumptions about the speeds that trailers hauled by heavy-duty tractors travel. In addition, the Agencies failed properly to account for the additional weight of aerodynamic devices that in many circumstances would *increase* fuel consumption and also displace cargo, which would result in more trips and more emissions. Those additional trips also translate into more injuries and fatalities on U.S. roads in order to achieve negligible if any global climate benefits.

In short, the Agencies have offered a rationale that is unsupported by the statutory language and that vastly expands their regulatory reach to products that are not encompassed in the enabling statutes and that have never been subject to air pollution, GHG or fuel economy regulation before. The regulations that the Agencies have imposed will have irreparable and immediate harmful effects on the trailer manufacturing members of TTMA. Reconsideration and a stay are therefore warranted.

BACKGROUND

In October 2016, the Agencies promulgated a Final Rule establishing "Phase 2" GHG and fuel economy standards for on-road medium- and heavy-duty vehicles and engines. *See* 81 Fed. Reg. 73,478 (Oct. 25, 2016). The Final Rule includes standards applicable to a range of heavy-duty vehicles and engines, including combination tractors, heavy-duty pickup trucks and vans, and vocational vehicles. *Id.* at 73,478. As relevant here, however, the Final Rule also includes, for the first time, GHG and fuel economy standards that apply directly to *trailers* that are hauled by heavy-duty tractors. *Id.* at 73,642 ("The HD Phase 2 program represents the first time CO₂ emission and fuel consumption standards have been established for manufacturers of new trailers."). Prior to the Final Rule, neither EPA nor NHTSA regulated the GHG and fuel economy impacts of trailers, instead relying on voluntary programs (such as EPA's SmartWay Program) and market incentives to encourage manufacturers to adopt aerodynamic and other technologies that, under limited operating conditions, can reduce GHG emissions and improve fuel economy from tractors when hauling trailers equipped with these technologies.

A. The Trailer Standards and EPA Compliance Program

The new GHG and fuel economy standards mandate that certain types of trailers manufactured after January 1, 2018 (in the case of the EPA GHG standards)⁴ or January 1, 2021

⁴ *See* 81 Fed. Reg. at 74,049; 40 C.F.R. § 1037.5(h)(4). Qualifying "small manufacturers," defined to include manufacturers with fewer than 1,000 employees, are not subject to the GHG manufacturing standards until January 1, 2019, although they still must register with EPA and label as "exempt" all trailers manufactured in 2018. 81 Fed. Reg. at 74,059; 40 C.F.R. § 1037.150(c).

(in the case of the NHTSA fuel economy standards)⁵ comply with specified emission limits. These emission limits are expressed in grams of carbon dioxide (“CO₂”) per ton-mile⁶ and gallons per 1,000 ton-miles for the GHG and fuel economy standards, respectively.⁷ Of course, trailers do not themselves emit CO₂ or consume fuel for propulsion. Thus, the Final Rule requires manufacturers to calculate estimated CO₂ emissions levels and fuel consumption rates using a “compliance equation” that is specified in the regulations.⁸ According to the Agencies, this compliance equation was developed using “standard” reference tractors and thus “the regulatory standards refer to the simulated emissions and fuel consumption of a standard tractor pulling the trailer being certified.”⁹ To meet the new emission standards, trailer manufacturers must install aerodynamic devices (such as side skirts and trailer tails), low-rolling resistance tires and automatic tire inflation systems. Depending on specific trailer designs, and as the standards tighten over time under the regulations, trailer manufacturers may also be forced to utilize lightweight materials. All of these options are assigned inputs to the compliance equation.¹⁰

Trailer manufacturers must perform several steps in advance of 2018 to ensure that their trailers manufactured after January 1, 2018 comply with the new EPA GHG standards. In particular, trailer manufacturers must register on-line with the EPA Verify access system, obtain a manufacturer code, and develop and submit applications for certificates of conformity,¹¹ although the EPA has not yet developed or implemented the procedures that allow manufacturers to make these applications and does not expect to do so until roughly the end of the summer. These steps require manufacturers to assess their trailer model lines and make plans for incorporating the mandated equipment (side skirts, trailer tails, low-rolling resistance tires, automatic tire inflation and tire pressure monitoring systems, etc.) into projected customer orders. Manufacturers also must evaluate, and in some cases test, the equipment to be installed to determine the applicable inputs for the compliance equation used to calculate GHG emissions and fuel consumption for various trailer types and configurations.¹² They must project sales for 2018 and obtain a certificate of conformity from EPA before selling any Model 2018 trailers, and then they must negotiate or re-negotiate sales orders and complete custom engineering for those trailers to incorporate the necessary equipment even if their customers would not otherwise purchase it. The manufacturers must acquire GHG inventory, train employees, and re-configure

⁵ See 81 Fed. Reg. at 74,238; 49 C.F.R. 535.3(d)(5)(iv) (NHTSA standards go into effect January 1, 2021 and are voluntary for model years 2018 through 2020).

⁶ See 81 Fed. Reg. at 74,054; 40 C.F.R. § 1037.107.

⁷ See 81 Fed. Reg. at 74,255; 49 C.F.R. § 535.5(e).

⁸ See 81 Fed. Reg. at 74,073, 74259; 40 C.F.R. § 1037.515(a)(1); 49 C.F.R. § 535.6(e).

⁹ 81 Fed. Reg. at 73,647.

¹⁰ Under the EPA rules, for model years through 2026, trailer manufacturers may designate a limited number of trailers as exempt from the standards and certification requirements. See 81 Fed. Reg. at 74,060; 40 C.F.R. § 1037.150(v). As a practical matter, however, nearly all trailers will be required to meet the new GHG standards starting in 2018 (or 2019 for “small” manufacturers).

¹¹ See 81 Fed. Reg. at 74,062; 40 C.F.R. § 1037.205.

¹² See, e.g., 81 Fed. Reg. at 74,081; 40 C.F.R. § 1037.526.

assembly lines to enable production, and they must develop data collection and reporting systems to ensure compliance. Trailer manufacturers would not have to incur these costs and disruptions in customer relations and manufacturing processes but for the GHG standards for trailers.

B. TTMA Petition for Review and Correspondence with the Agencies

On December 22, 2016, TTMA filed a petition for review of the Final Rule in the U.S. Court of Appeals for the D.C. Circuit on the grounds that (1) the Agencies lack statutory authority to regulate trailers with respect to GHG emissions and fuel consumption, and (2) the Final Rule, as applied to trailers, is arbitrary and capricious because, among other reasons, the Agencies utilized unrealistic assumptions in their cost/benefit analysis and failed properly to account for the additional weight and cost of aerodynamic devices, which increase fuel consumption and displace cargo, thereby resulting in more trips, more emissions, and more accidents. *See Truck Trailer Manufacturers Association v. EPA, et al.*, No. 16-1430. That litigation is pending and, as of the date of this Petition, no briefing schedule has been set.

On April 3, 2017, TTMA sent a letter to EPA Administrator Scott Pruitt and Department of Transportation (“DOT”) Secretary Elaine Chao requesting that the Agencies reconsider and rescind the Phase 2 GHG and fuel economy standards applicable to trailers. TTMA resubmitted the April 3 letter to EPA on April 13, 2017 in response to EPA’s Request for Comment on regulations that may be appropriate for repeal, replacement, or modification under Executive Order 13777, “Enforcing the Regulatory Reform Agenda.” *See* 82 Fed. Reg. 17,793 (Apr. 13, 2017). In light of TTMA’s request, the Agencies moved for a 90-day abeyance of the D.C. Circuit litigation, which the Court granted on May 8, 2017.

ISSUES MERITING RECONSIDERATION

EPA and NHTSA should reconsider the Final Rule; in fact, they are required to do so. On March 28, 2017, President Trump issued Executive Order 13777 on Promoting Energy Independence and Economic Growth. Section 3(d) of the Executive Order mandates that all agencies review and identify actions that are related to or arose from President Obama’s June 2013 Climate Action Plan. The GHG and fuel economy trailer standards contained in the Final Rule are clearly within the scope of this Order, because the Final Rule is related to and arose from the 2013 Climate Action Plan. *See* Executive Office of the President, *The President’s Climate Action Plan* at 8 (June 2013) (addressing increased fuel economy standards for heavy-duty vehicles); *see also* 81 Fed. Reg. at 73,480 (describing the Final Rule as having been “called for” in the 2013 Climate Action Plan). The Executive Order further directs that each agency shall, as soon as practicable, publish for notice and comment proposed rules suspending, revising, or rescinding any such actions, as appropriate and consistent with law and the policies stated in Section 1 of the Order. The Order states in its very first sentence a policy to avoid regulatory burdens that unnecessarily constrain economic growth and prevent job creation. Section 1 goes on to elaborate as policy that environmental regulations must comply with the law, have greater benefits than costs, and rely on the best available peer-reviewed science and economics. For the reasons summarized above and detailed below, the trailer requirements in the Final Rule are unlawful and conflict with these policies.

Furthermore, in seeking to justify the costs as outweighing the benefits of the Final Rule, the Agencies relied on the Obama Administration's "social cost of carbon." *See* 81 Fed. Reg. at 73875 (explaining that the Agencies "estimate the global social benefits of CO₂ emission reductions expected from the heavy-duty GHG and fuel efficiency standards using the social cost of carbon"). The March 28 Executive Order directed that the prior Administration's social cost of carbon analyses be withdrawn, and that, effective immediately, agencies shall ensure that estimates used in valuing the GHG impacts of regulations be consistent with OMB Circular A-4 (Sept. 17, 2003). The Order specifically directed that this include considering the societal benefits of reducing carbon in the United States but not the rest of the world, and a different approach to considering the appropriate discount rates. Accordingly, the Order directs a new approach, effective immediately, that is different from and in conflict with the approach the Agencies used to justify the Final Rule, including the trailer standards. The Order makes clear that the Agencies' approach is "no longer representative of government policy." Not only does this constitute a further policy reason to revisit the trailer requirements, but it constitutes centrally relevant new information requiring reconsideration of the rule under Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B). Indeed, such reconsideration is especially acute here, where the Agencies judged the requirements as worthwhile after weighing benefits of reducing carbon—including such benefits outside of the United States—against costs that include an increase in traffic accidents and several additional highway fatalities in the United States.

REQUEST FOR CAA 307(D) STAY PENDING RECONSIDERATION

Section 307(d)(7)(B) of the CAA authorizes EPA to stay the effectiveness of a rule that it is reconsidering "for a period not to exceed three months." 42 U.S.C. § 7607(d)(7)(B). Such a stay gives the Agency time to reconsider its position and review the rule's requirements without imposing unnecessary compliance costs on regulated entities. EPA also may use a section 307(d) stay to avoid any confusion caused by the Agency implementing and then subsequently revising its regulatory requirements. Staying—or, in this case, extending—the implementation date of the new GHG standards for trailers until EPA completes its reconsideration process thus avoids the otherwise imminent compliance burdens and uncertainty for the regulated industry.

TTMA respectfully requests that EPA exercise its authority under the CAA to stay the effectiveness of the GHG standards for trailers pending reconsideration to the fullest extent permissible by the Clean Air Act. The Final Rule imposes imminent and substantial compliance obligations on trailer manufacturers that have more than 1,000 employees. The new GHG standards for trailers require compliance by TTMA's members beginning January 1, 2018. *See* 81 Fed. Reg. at 74049; 40 C.F.R. § 1037.5(h)(4). For 2018 trailer production, these new GHG standards will mandate installation of side skirts, trailer tails, low rolling resistance tires, and tire pressure inflation/monitoring systems on nearly all trailers manufactured and sold in the United States by TTMA's members.¹³ As explained in more detail below, trailer manufacturers must

¹³ As noted, qualifying small manufacturers are exempt from the GHG manufacturing standards until January 1, 2019, although they must still register with EPA and label their 2018 Model trailers as exempt. *See* 81 Fed. Reg. at 74,059; 40 C.F.R. § 1037.150(c). Other manufacturers

Footnote continued on next page

take steps well before January 1, 2018 to comply with these new EPA requirements. Staying the rule during reconsideration—by extending the January 1, 2018 implementation date for the EPA trailer standards—will avoid imposing these compliance costs prematurely and avoid confusion and disruption among the regulated industry. In short, a stay would afford EPA the time necessary fully to reconsider the Final Rule without adversely affecting the regulated industry.

REQUEST FOR APA 705 STAY PENDING JUDICIAL REVIEW

In addition to this petition for reconsideration, TTMA has filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit challenging the Final Rule on the grounds that the new GHG and fuel economy standards applicable to trailers exceed the scope of EPA and NHTSA's statutory authorities and the Agencies did not adequately consider costs or properly assess benefits when promulgating these new standards. While judicial review is pending, Section 705 of the APA allows EPA to stay the effective date of a final rule if it "finds that justice so requires." 5 U.S.C. § 705. TTMA requests that EPA make such a finding here.

Both EPA and the courts have applied a four-part test to determine whether "justice so requires" a stay of agency action pending judicial review. Under that test, the Agency must consider: (1) whether there is a likelihood of success on the merits of the judicial challenge, (2) irreparable harm to the moving party if the stay is not granted, (3) the potential for harm to others if the stay is granted, and (4) whether the public interest weighs in favor of granting the stay. *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C. 2012). As explained below, each of these factors weighs in favor of staying this Final Rule as applied to trailers until the resolution of judicial review.

A. TTMA's Challenge is Likely to Succeed on the Merits

The TTMA's petition for review is likely to succeed on the merits. Principally, the Clean Air Act makes manifestly clear that EPA lacks authority to regulate trailers. Even if EPA had such authority, the rule would be invalid because it is arbitrary and capricious.

1. EPA Lacks Authority To Regulate Trailers

EPA claims that it has authority to regulate trailers under Section 202 of the Clean Air Act, which authorizes EPA to prescribe "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines . . . , whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution." 42 U.S.C. § 7521(a)(1). But the Act defines the term "motor vehicle" to mean "any self-propelled vehicle designed for transporting persons or property on a street or highway." *Id.* § 7550(2). It is undisputed that a trailer is not self-propelled. That should be the end of the matter. If a trailer is not self-propelled, it is not a motor vehicle under § 7550(2), and the EPA may not regulate it under § 7521(a)(1).

Footnote continued from previous page

can exempt up to 20 percent of their annual production, subject to caps of 350 units for box van trailers and 250 units for non-box trailers. *See* 81 Fed. Reg. at 74,060; 40 C.F.R. § 1037.150(v).

In the Final Rule, EPA argues that a trailer is something called an “incomplete vehicle,” a term that appears nowhere in the Clean Air Act. EPA argues that it can regulate “incomplete vehicles” because the Act applies “whether [motor vehicles] and [motor vehicle] engines are designed as complete systems or incorporate devices to prevent or control such pollution.” § 7521(a)(1). This statutory language does just what it says: it provides authority to regulate motor vehicles or engines that are not complete *systems*, in the sense that they incorporate pollution-controlling devices. But a vehicle that is not “designed as [a] complete system[]” because it contains a pollution-controlling device is nonetheless self-propelled, and it is still a motor vehicle. The Act’s grant of regulatory power over motor vehicles that incorporate pollution-controlling devices does not somehow implicitly signal that EPA also can regulate products that are *not* motor vehicles. Indeed, if EPA’s analysis were correct, the phrase “motor vehicle engine” in § 7521(a)(1) would be entirely superfluous. After all, under EPA’s theory, an engine is as much an “incomplete vehicle” as a trailer. If Congress had intended to authorize the regulation of “incomplete vehicles” in a manner that would encompass trailers, the statute would have said so.

The Final Rule describes three other statutory provisions as “incomplete vehicle provisions,” 81 Fed. Reg. 73,514, but the provisions each expressly require that “motor vehicles” meet specified requirements, rather than imposing requirements on components. *See* § 7521(a)(6) (EPA must require that “new light-duty vehicles ... be equipped with” onboard vapor recovery systems); § 7521(a)(5)(A) (“fill pipe standards for new motor vehicles”); § 7521(k) (regulations “applicable to evaporative emissions of hydrocarbons from all gasoline-fueled motor vehicles”). EPA’s statement that these provisions concern “incomplete vehicles” is puzzling at best. Of course regulating a “motor vehicle” may *impact* or even necessitate additional components or parts of that vehicle, but no normal speaker of English would conclude that, for example, a provision requiring a vehicle to contain an onboard vapor recovery system constitutes a regulation of an “incomplete vehicle.” But it is academic in any event. If EPA is correct that the Act contains specific provisions targeted at specific types of equipment that are not “motor vehicles” but rather “incomplete vehicles,” that only confirms that the grant of authority in § 7521(a) does not extend generally to *anything* the EPA might term an “incomplete vehicle.”

Even if EPA could regulate an “incomplete vehicle” under the convoluted theory that § 7521(a) refers to “systems” that are not “complete,” a trailer would not qualify. A trailer may sometimes be attached to a tractor, but that no more makes it an “incomplete vehicle” than a wagon is an “incomplete horse.” The term “incomplete” means “lacking a usually necessary part, element, or step.”¹⁴ A trailer is not a “necessary part” of a vehicle, and obviously is not “necessary” for purposes of self-propulsion, which is the defining feature of the term “motor vehicle” in the Clean Air Act. Trailers are manufactured and sold separately to different ultimate purchasers from tractors, and the same trailers are routinely attached to and hauled by many different tractors over the course of their useful life. Each tractor likewise hauls many different trailers. A particular tractor-trailer combination is thus in no sense a single motor vehicle. In fact, the EPA itself in previous rulemakings has made clear its interpretation that that trailers are

¹⁴ <https://www.merriam-webster.com/dictionary/incomplete>

not vehicles, incomplete or otherwise; instead, the tractor is the vehicle, and the trailer is not. *E.g.*, 76 Fed. Reg. 57,106, 57,114 (Sept. 15, 2011) (explaining that “gross combined weight rating ... describes the maximum load that the vehicle can haul, including the weight of a loaded trailer *and the vehicle itself*”) (emphasis added).

Indeed, the United States government has repeatedly and successfully taken the common-sense position that a trailer is not a vehicle for purposes of federal criminal laws precisely because it is not “self-propelled,” *see* 18 U.S.C. § 2311, and that this *does not change* when the trailer is attached to the truck. This theory that a trailer attached to a tractor is not a vehicle has enabled the government to charge individuals who steal a combination tractor-trailer with two crimes—stealing a vehicle (the tractor) and stealing a “good” (the trailer)—and obtain consecutive sentences. *E.g.*, *Bernard v. United States*, 872 F.2d 376, 377 (11th Cir. 1989); *United States v. Lofty*, 455 F.2d 506, 506 (4th Cir. 1972); *United States v. Kidding*, 560 F.2d 1303, 1308 (7th Cir. 1977). As the Seventh Circuit explained in adopting the United States’ argument in that context, “[c]learly a trailer, if it stands alone, is not a motor vehicle,” and the combination of the trailer and tractor does not change that result, because the “trailer was not indispensable to making the tractor a ‘vehicle.’” *Id.*

EPA’s theory that Congress silently authorized the regulation of trailers via § 7521(a)(1)’s “complete systems” language is also irreconcilable with the language of numerous other federal statutes that define the term “motor vehicle” to reach trailers expressly. *E.g.*, 40 U.S.C. § 17101(2) (“‘motor vehicle’ means a vehicle, self-propelled or drawn by mechanical power...”); 40 U.S.C. § 17501(2) (“‘motor vehicle means ... a vehicle self-propelled or drawn by mechanical power”); 18 U.S.C. § 31(a)(6) (“‘motor vehicle’ means every description of carriage or other contrivance propelled or drawn by mechanical power”); 49 U.S.C. § 30102(7) (“‘motor vehicle’ means a vehicle driven or drawn by mechanical power ...”); 49 U.S.C. 32101(7) (same); 49 U.S.C. § 30301 (“‘motor vehicle’ means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power”). Congress “knew how to provide for” regulation of trailers, *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996), and its omission of language like “drawn by mechanical power” in the Clean Air Act confirms that it did not intend to do so here.

Finally, the “incomplete vehicle” theory would render EPA’s regulatory authority essentially limitless. EPA protests that interpreting § 7521(a)(1) to cover “incomplete vehicles” “is not to say that the Act authorizes emission standards for any part of a motor vehicle, however insignificant.” 81 Fed. Reg. 73514. But under EPA’s interpretation in the Final Rule, the Act *does* authorize the EPA to set emissions standards for any part of a motor vehicle. Nothing in the Act provides any basis upon which to distinguish between a trailer and any other component; there is no “intelligible principle” contained within the Act itself. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The Final Rule announces that a trailer “properly fall[s] on the vehicle side of the line,” 81 Fed. Reg. 73515, but this is just ipse dixit. The absence of any “intelligible principle” in the Act that sets the limits of EPA’s authority to decide what constitutes an “incomplete vehicle” is a strong indication that the Act does not in fact permit regulation of an

“incomplete vehicle.” Indeed, if EPA’s interpretation were correct, the Act would be unconstitutional under the nondelegation doctrine. *Mistretta*, 488 U.S. at 372.¹⁵

At bottom, EPA’s “incomplete vehicle” theory would vastly expand its regulatory reach to equipment that Congress expressly excluded from regulation, namely, equipment that is not self-propelled. Dubbing something an “incomplete vehicle” is just another way of saying that it is *not* a vehicle. EPA’s argument is highly unlikely to succeed on the merits.

2. The Rules are Arbitrary and Capricious

Even if EPA did have authority under the Clean Air Act to regulate trailers—and it does not—the trailer standards are arbitrary and capricious.

First, the Agencies overstated the GHG and fuel economy benefits of the trailer standards by using unrealistic and unsupported assumptions regarding the speeds at which trailers hauled by heavy-duty tractors travel. The Agencies projected GHG and fuel economy benefits from, among other things, drag reduction achieved by aerodynamic devices, which is primarily a function of vehicle speed.¹⁶ In performing their analysis, the Agencies used drive cycle weightings from the Phase 1 heavy-duty vehicle rule to characterize the percentage of vehicle miles traveled at certain speeds—below 55 miles per hour (“mph”), between 55 and 65 mph, and above 65 mph—by different types of trailers.¹⁷ Those drive cycle weightings, however, are not supported by the underlying data. In fact, although the Agencies characterized the percentage of vehicle miles traveled at speeds exceeding 65 mph, not one of the studies upon which the Agencies relied actually included a “greater than 65 mph” speed category.

¹⁵ TTMA has also petitioned for review of the fuel economy standards in the Final Rule, on the ground that NHTSA too lacked authority to regulate trailers. The Energy Independence and Security Act, which authorized NHTSA’s participation in the rulemaking, applies to “commercial medium- and heavy-duty on-highway vehicle[s],” 49 U.S.C. § 32902(k)(2), and defines that term to mean “an on-highway vehicle with a GVWR of 10,000 lbs or more,” *id.* § 32901(a)(7). That definition excludes a trailer. As EPA has recognized in prior rulemakings: “GVWR describes the maximum load that can be carried by a vehicle, including the weight of the vehicle itself. Heavy-duty vehicles also have a gross combined weight rating (GCWR), which describes the maximum load that the vehicle can haul, including the weight of a loaded trailer and the vehicle itself.” 76 Fed. Reg. 57,106, 57,114 (Sept. 15, 2011). Congress’s reference to GVWR thus excludes trailers as a textual matter. However, because TTMA is only seeking a stay of the emissions standards promulgated by the EPA because NHTSA’s mandatory standards do not take effect until January 1, 2021, there is no need to consider the TTMA’s likelihood of success on its challenge to NHTSA’s authority at this time.

¹⁶ Speed matters exponentially, as the basic drag equation uses velocity *squared*. Adding another 5 miles per hour to 50 mph input data produces a result much greater than a 10% increase. Reductions in drag calculated for aerodynamic equipment on trailers that are assumed to operate at higher than actual speeds will similarly overstate benefits.

¹⁷ EPA/NHTSA, Response to Comments for Joint Rulemaking, EPA-420-R-16-901, at 1030-31 (Aug. 2016).

The Agencies assumed that long (53-foot) dry-freight and refrigerated vans are operated at speeds exceeding 65 mph for 86 percent of the vehicle miles traveled and at speeds between 55 and 65 mph for 9 percent of the vehicle miles traveled.¹⁸ The Agencies further assumed that short dry-freight and refrigerated vans are operated at speeds exceeding 65 mph for 64 percent of the vehicle miles traveled and at speeds between 55 and 65 mph for 17 percent of the vehicle miles traveled.¹⁹ The Agencies explained that these ranges were derived from three studies: (1) an EPA MOVES analysis of Federal Highway Administration data from 1999; (2) a University of California Riverside (UCR) evaluation in 2006 of data from 270 trucks; and (3) an Oak Ridge National Laboratory study of a fleet of six trucks published in 2009.²⁰ Critically, however, not one of these studies included a “greater than 65 mph” speed category—the EPA MOVES and Oak Ridge analyses reported the fraction of vehicle miles traveled at speeds exceeding 60 mph, and the UCR analysis reported the fraction of vehicle miles traveled at speeds exceeding 45 mph.²¹ Moreover, the actual percentages used by the Agencies (86 and 9 percent for long van trailers and 64 and 17 percent for short van trailers) come directly from the EPA MOVES analysis. But the speed ranges reported in the EPA MOVES analysis were actually five mph slower—greater than 60 mph and 50 to 60 mph, respectively.²² In other words, the Agencies assumed that long van trailers travel at speeds exceeding 55 mph for 95 percent of the vehicle miles traveled based solely on data reporting that such trailers travel at speeds exceeding 50 mph for 95 percent of the vehicle miles traveled. Simply put, the Agencies selected the highest percentages for miles traveled from only one of the three cited data sources, in effect ignoring the other two, and then inflated the speed threshold for those miles traveled. As a consequence, the Agencies’ own data do not support the speed distribution ranges they used to evaluate the purported benefits of the trailer standards, thus rendering those standards themselves arbitrary and capricious.²³

¹⁸ See 81 Fed. Reg. at 73,654.

¹⁹ *Id.*

²⁰ EPA/NHTSA, Response to Comments for Joint Rulemaking, EPA-420-R-16-901, at 1030 (Aug. 2016).

²¹ *Id.* at 1031 (Table 3-14).

²² *Id.*

²³ Moreover, even if the Agencies accurately characterized the data from the EPA MOVES analysis, those data are not representative of real-world operation. The EPA MOVES data for long van trailers, for example, were recorded on “restricted access” highways. EPA/NHTSA, Response to Comments for Joint Rulemaking, EPA-420-R-16-901, at 1030 (Aug. 2016). Long van trailers are operated on all types of highways, not just those with restricted access. In fact, most non-restricted rural highways do not even allow speeds in excess of 65 mph. Utility Trailer Manufacturing Company (“Utility”) submitted data from three long-haul trucking fleets that more accurately reflect real-world operation. Comments of Utility Trailer Manufacturing Co., EPA-HQ-OAR-2014-0827-1183, at 4-7. The Agencies erroneously concluded that “the fleet data provided by Utility is not substantially different than the current GEM drive cycle weightings.” Memorandum to Docket EPA-HQ-OAR-2014-0827, “Comparison of GEM Drive Cycle Weightings and Fleet Data Provided by Utility Trailer Manufacturing Co. in Public Comments” (July 2016). The record does not support that conclusion. Whereas the Agencies

Footnote continued on next page

Second, the Agencies failed to account fully for the additional weight of aerodynamic devices, which increase fuel consumption and displace cargo, resulting in more trips, more emissions, and more accidents. As described above, the GHG trailer standards will mandate that trailer manufacturers install side skirts and trailer tails, among other devices, on nearly all of the trailers they manufacture. Side skirts add, on average, about 250 pounds to the weight of a typical 53-foot trailer, and trailer tails add an additional 150 pounds.²⁴ The Agencies attempted to evaluate the impact of additional vehicle weight due to the use of aerodynamic devices,²⁵ but failed to address the effect of cargo displacement. Because motor carriers must operate below an 80,000-pound maximum weight limit for the tractor, trailer and cargo combined,²⁶ the addition of side skirts and tails would cause some trucks to “weigh-out.” Consequently, motor carriers will have to shift cargo from some of their trucks, resulting in additional trips to transport freight that could not be moved by the “weighed-out” trucks. TTMA estimates that these additional trips would cause an additional 184 million truck miles traveled per year, resulting in additional emissions as well as 246 more accidents and 7 additional fatal crashes per year.²⁷

In response to these concerns, the Agencies summarily explained that the additional weight from aerodynamic devices “can easily be offset by substituting lightweight components” elsewhere in the trailer designs.²⁸ This response is not sufficient. Motor carriers already demand that trailers weigh and cost as little as possible while still being capable of carrying the expected freight loads. Lighter-weight alternative materials (such as aluminum) are considerably more expensive than standard materials (such as steel), and often are not desired by customers. The Agencies’ unreasonably assume that trailer manufacturers required to add several hundred pounds of aerodynamic equipment to their trailers will voluntarily offset that weight by installing more expensive, light-weight technologies. If the cost of the light-weight material is not worthwhile to customers in the first instance to make room for more cargo, there is no reason to believe that they will be willing to bear that additional cost to make room for more cargo just

Footnote continued from previous page

determined that long van trailers travel at speeds exceeding 55 mph for 95 percent of the vehicle miles traveled, Utility’s data show that such trailers travel at speeds exceeding 55 mph for only 84 percent of the vehicle miles traveled—a difference of 11 percentage points. *Id.* at 2. The Agencies’ decision to disregard the real-world fleet data submitted by Utility was arbitrary and capricious.

²⁴ See Comments of Truck Trailer Manufacturers Association, EPA-HQ-OAR-2014-0827-1172-A1, at 7-8.

²⁵ See Memorandum to Docket EPA-HQ-OAR-2014-0827, “Impact of Additional Weight Due to Trailer Aerodynamic Devices” (July 18, 2016).

²⁶ See 23 CFR § 658.17(b).

²⁷ See Comments of Truck Trailer Manufacturers Association, EPA-HQ-OAR-2014-0827-1172-A1, at 7-8. The Agencies disagree with certain of TTMA’s assumptions and conclude that the additional truck miles will result in an increase of about three fatalities per year. EPA/NHTSA, Response to Comments for Joint Rulemaking, EPA-420-R-16-901, at 1019 (Aug. 2016).

²⁸ EPA/NHTSA, Response to Comments for Joint Rulemaking, EPA-420-R-16-901, at 1016 (Aug. 2016).

because the total cargo capacity is reduced by the aerodynamic equipment. In fact, the aerodynamic equipment consumes weight and cargo capacity, which will inexorably lead to more (and heavier) trucks in the U.S. fleet to carry the same total cargo, with the additional trucks emitting additional pollutants, adding to total truck miles traveled, and causing more accidents, injuries and fatalities.

B. TTMA's Members Will Suffer Irreparable Harm

TTMA's members face a substantial loss of business, market share, and goodwill as a consequence of the regulations, as well as irreparable compliance costs. Although the GHG regulations take effect on January 1, 2018, TTMA's members face these harms imminently. Trailers are manufactured to each customer's unique specifications, and new orders must be placed about six months in advance of actual production. Accordingly, TTMA members' customers are putting in orders for delivery in January 2018 beginning now, in June 2017.

To be in a position to produce trailers that are compliant with the GHG regulations by January 2018, TTMA's members must make far-reaching and costly changes to their business, starting now. They must identify component suppliers for the required equipment, evaluate and, where necessary, test that equipment, revise pricing and trailer option books and train sales representatives to explain the compliant option combinations to customers, add manufacturing floor space and reconfigure assembly lines, train production employees to install the new GHG equipment, and develop data collection and reporting systems to ensure compliance. One TTMA member, for example, estimates that it will incur over \$7.5 million in costs in 2017-2018 simply to provide inventory storage areas, transport the GHG equipment to its plants, modify plant facilities to enable installation of this equipment on trailers as part of its assembly lines, and secure trained employees to install the new GHG equipment on the requisite number of trailers. That figure omits costs for engineering work to evaluate all possible trailer configurations for compatibility with the new GHG regulations, the cost of administrative work needed to apply for certification and operate a compliance program, and the cost of the GHG equipment itself, and the business disruption and significant loss of efficiency while changes are made to production lines, supply chains, manufacturing protocols, and storage options. Other manufacturers, depending on their size, anticipate spending between \$300,000 and \$6.3 million in 2017-2018 on developing compliance systems and procuring and installing GHG equipment. In addition, TTMA estimates that the material and delivery costs of purchasing the new GHG equipment will exceed \$100 million annually. Even EPA assumes that its new regulations will create substantial compliance costs, including redesign, re-engineering, and identifying new suppliers.

These compliance costs qualify as irreparable harm. “[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs.” *Texas v. United States Envtl. Prot. Agency*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994) (Scalia, J., concurring in part and in the judgment)). For example, being forced to undertake “difficult, time-consuming, and expensive safety testing regarding the safety ... of their products” and to spend “more time and significantly more money” in development is irreparable harm that “can never be recouped.” *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 28-29 (D.D.C. 1997). No matter what, TTMA's members will “be forced to incur large costs which, if [they] manage[]

to survive those, will disrupt and change the whole nature of [their] business in ways that most likely cannot be compensated with damages alone.” *Am. Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009) (finding irreparable harm where companies would be forced to begin complying with a regulation they alleged was preempted); *see also Portland Cement Ass'n v. E.P.A.*, 665 F.3d 177, 189 (D.C. Cir. 2011) (staying portion of EPA rule because “industry should not have to build expensive new containment structures until the standard is finally determined”). TTMA’s members have no mechanism to recover these costs from the government if the GHG regulations are later held to be invalid.

Beyond compliance costs, TTMA’s members also face an irreparable loss of business relationships, market share, and goodwill. As noted, motor carriers who wish to purchase trailers equipped with side-skirts and other fuel-saving devices are already doing so; other carriers have concluded that purchasing these trailers makes no economic sense for their trucking operations. Because TTMA’s members must begin accepting orders six months ahead of delivery, most of TTMA’s members are now required to quote only compliant products to prospective customers, most of whom have so far not wanted this added equipment. Those customers will look to other trailer manufacturers who can offer exempt trailers. Preventing companies from delivering their products to customers “almost inevitably creates irreparable damage to ... good will.” *Reuters Ltd. v. UPI, Inc.*, 903 F.2d 904, 908 (2d Cir. 1990); *id.* at 909 (“irreparable harm has often consisted of the loss of customers and the competitive disadvantage that resulted from a distributor's inability to supply its customers with the terminated product”); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (“irreparable harm through loss of reputation, good will, and business opportunities”). The harm is especially irreparable here because not all trailer manufacturers are subject to the new regulations. Smaller manufacturers need not begin selling and installing GHG-control equipment until 2019, which means they are currently free to accept orders without the unwanted and expensive equipment. In other words, some of TTMA’s members face an imminent risk of loss of market share because, as a consequence of the new rules, their customers will *only* be able to purchase the products they prefer from other manufacturers. “It is well-established that a movant’s loss of current or future market share may constitute irreparable harm.” *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 67 (2d Cir. 2007); *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005). “In a competitive industry where consumers are brand-loyal, we believe that loss of market share is a ‘potential harm which cannot be redressed by a legal or an equitable remedy following a trial.’” *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm.*, 290 F.3d 578, 596 (3d Cir. 2002).

C. No Third Parties Will Be Harmed If There is A Stay

Granting a temporary stay of the trailer standards would not cause harm to third parties because the trailer standards, even if implemented, would achieve little if any benefit to global climate change. This is because trailer manufacturers *already* install and sell the mandated technologies where those technologies are most likely to improve fuel economy and thereby reduce GHG emissions. The motor carrier industry is an extremely competitive, low-margin industry that is particularly sensitive to fuel costs and trailer weight (which impacts the amount of cargo the tractor-trailer combination can haul in light of the 80,000-pound weight limit). Consequently, motor carrier customers already pressure their trailer manufacturer suppliers to

install low-rolling resistance tires and aerodynamic equipment where the nature of their trucking operations will enable them to realize measureable fuel savings, and to reduce trailer weight where cost-effective to enable them to haul additional cargo.

Thus, because trailers are used in a variety of applications, trailer manufacturers must customize the trailers they manufacture and sell to meet their customers' specific needs. Market forces already dictate that trailer manufacturers install and sell technologies designed to reduce aerodynamic drag and road friction for applications in which such technologies are likely to materially improve fuel economy (and thus GHG emissions performance). For trailers used in long-haul applications, for example—where the tractor-trailer combination will travel long distances at high speeds—these technologies can have a significant impact on fuel consumption. A customer operating a truck fleet engaged in long-haul operations thus has a significant incentive to demand aerodynamic and friction-reducing technologies on its trailers to reduce overall fuel costs.

In contrast, aerodynamic and friction-reducing technologies do not materially reduce fuel consumption or GHG emissions during short-haul operations at lower speeds (*e.g.*, in-city deliveries, food service, etc.). For these applications, customers typically do not request, and trailer manufacturers do not install, aerodynamic and friction-reducing technologies because the costs of doing so significantly outweigh any potential benefits. The trailer standards, however, would mandate that trailer manufacturers install and sell these technologies on nearly all heavy-duty trailers, including those designated for short-haul operations. The trailer standards thus create compliance costs for trailer manufacturers and their customers without providing corresponding fuel economy or GHG benefits to third parties and the environment. Indeed, the added weight of the aerodynamic equipment in those operations will cause *greater* fuel consumption and *increased* GHG emissions.

In short, because the trailer standards provide no demonstrable benefit to third parties or the environment beyond what the trailer industry already is achieving due to market forces, this factor weighs in favor of granting a stay.

D. A Stay is In the Public Interest

Staying the effective date of the Final Rule's trailer standards also is in the public interest. If the trailer standards remain in effect during the pendency of judicial review, they will impose substantial compliance costs on regulated entities that cannot be recouped, without providing any material benefit to the general public or the environment. As addressed above, trailer manufacturers already install and sell aerodynamic and friction-reducing technologies where such technologies are likely to achieve GHG and fuel economy benefits. The Agencies have not demonstrated that mandating trailer manufacturers to install and sell such technologies on additional trailers—beyond what the trailer industry already is doing—will benefit the public. Indeed, as described above, the new trailer standards actually will have the opposite effect—they will needlessly force manufacturers to add heavy aerodynamic devices to their trailers, thereby displacing cargo and resulting in more trips to deliver the same amount of cargo, leading to increased fuel consumption, increased emissions, and increased trucking accidents in the United States. With negligible benefits for global climate change even when calculated by the

Agencies on a global basis, the American public must bear these additional costs and indeed at least several additional fatalities due to the need for more trucks on the Nation's roads to carry the same total cargo. This is contrary to the interest of the American public.

CONCLUSION

In sum, EPA and NHTSA should reconsider and rescind the GHG and fuel economy standards for heavy-duty truck trailers because such trailers are not motor vehicles and so the agencies lack authority impose such regulations on them. Even if the agencies did have such authority, they should reconsider and rescind these regulations because they arbitrarily impose requirements without properly considering whether additional aerodynamic equipment is productive at the speeds these trailers are hauled or the additional weight of such equipment that displaces cargo that must then be carried by additional trailers. Finally, EPA should immediately stay the effect of its GHG requirements for trailers, which are causing immediate and irreparable harm as trailer manufacturers must now take steps to comply with these rules for Model Year 2018.