Truck & Engine Manufacturers Association®
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333 West Wacker Drive, Suite 810
Chicago, Illinois, 60606
Phone/Fax: (312) 929-1970
www.truckandenginemanufacturers.org

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VIA EMAIL

James Clyne (james.clyne@dec.ny.gov)
Jeff Marshall (jeff.marshall@dec.ny.gov)
James Symon (james.symon@dec.ny.gov)
Division of Air Resources
Mobile Sources & Technology Development
New York Department of Environmental Conservation
625 Broadway
Albany, New York 12233

RE: New York DEC's Action Plan for Medium-Duty and Heavy-Duty ZEVs

Dear James, Jeff and James:

We are looking forward to our upcoming meeting on Monday, March 8th, to discuss the comments that the Truck and Engine Manufacturers Association (EMA) has developed concerning the Department of Environmental Conservation's (DEC's) proposed action plan to accelerate the deployment of medium-duty (MD) and heavy-duty (HD) zero-emission vehicles (ZEVs). To facilitate those discussions, and as a follow-up to the DEC's public meeting on February 17th, this letter outlines EMA's preliminary comments, particularly as they relate to the DEC's proposed regulatory action to adopt and opt-in to the California Air Resources Board's (CARB's) Advanced Clean Trucks (ACT) Regulation, as well as CARB's Omnibus Low-NO_x Regulations. EMA was actively engaged in the rulemaking process for both of those regulations.

EMA represents the world's leading manufacturers of MD and HD on-highway trucks and engines. EMA member companies design and manufacture highly-customized vehicles to perform a wide variety of commercial functions, including interstate trucking, regional freight shipping, local parcel pickup and delivery, refuse hauling, and construction – to name a few. EMA member companies are investing billions of dollars to develop MD and HD ZEVs and fully support expanding the market for those zero-emission vehicles in New York and nationwide.

Increasing the market penetration of ZEV trucks requires an iterative and multi-pronged approach including, among other things: (i) identifying the trucking fleet applications best-suited to a nearer-term transition to ZEV trucks — the "beachhead" markets; (ii) implementing incentive programs to enable the identified beachhead fleets to acquire and maintain ZEV trucks; (iii) researching and building-out the necessary ZEV infrastructure to support the beachhead ZEV fleets; and (iv) coordinating with other agencies, including EPA, to expand the deployment of ZEV trucks across other applications, using sufficient public resources and incentives to expand the necessary ZEV infrastructure and offset the initial increased marginal costs of commercial ZEVs.

CARB's ACT and Omnibus Low-NO_x Rules are not well-suited to achieving the desired accelerated deployment of MD and HD ZEV trucks. Rather, those Rules impose both infeasible ZEV-sales mandates on manufacturers (without accounting in any way for the necessary incentives and infrastructure deployment, and without including any corresponding ZEV-purchase mandates), and also establish unreasonably stringent, expensive and infeasible NO_x standards. As a result, a ZEV-deployment strategy based on CARB's Rules will frustrate rather than foster the acquisition and use of ZEV trucks in New York, will hurt the State's economy, and likely will impede environmental gains (through delayed fleet turnover or out-of-state truck purchases). As we explain below, there is a better roadmap for a more successful and collaborative way forward.

In that regard, we encourage the DEC to take advantage of the available time and means to implement an optimized ZEV-development strategy in New York without unwarranted dependence on CARB's Rules, which were developed to address the very unique air quality issues in California. New York has its own means to accelerate the deployment of commercial ZEVs and reduce HDOH emissions through the use of indirect source rules, the State's purchasing and contracting authority, deployment of earmarked incentive funding, and MOUs with manufacturers and fleets. In addition, the DEC has the flexibility to defer any potential opt-in regulations until 2022. That would allow more time to assess alternative approaches, including EMA's recommended roadmap and the steps that EPA is certain to take to adopt new nationwide regulations for HDOH vehicles and engines. Doing so will not impact DEC's plans to implement new HDOH engine and powertrain requirements for the 2025 model year.

i) <u>CARB's ACT Rule is not well-suited to the accelerated deployment of MD and HD ZEVs in New York</u>

Along with this letter, we are submitting copies of the detailed comments that EMA filed with CARB last year regarding its adoption of the ACT Rule. While those comments are extensive, we encourage you and your colleagues to review them. As they describe, EMA's over-arching concern is that the structure of CARB's ACT Regulation threatens to hinder, not promote, the emerging market for zero-emission commercial vehicles. In brief, the ACT Rule amounts to a naked sales mandate that requires manufacturers to sell a prescribed number of zero-emission medium- and heavy-duty vehicles, without any corresponding ZEV-purchase requirements. Consequently, instead of buying ZEV trucks, fleet customers may simply choose to purchase other less expensive truck technologies, or to continue maintaining their existing trucks.

MD and HD ZEVs have higher life-cycle costs and lower utility than conventionally-fueled vehicles, and the ACT Rule fails to consider the significant financial incentives needed to make MD and HD ZEVs an attractive investment for a trucking business. Further, the ACT Rule does not address or provide for the charging and refueling infrastructure that will be needed at fleet facilities to operate the mandated ZEVs, the build-out of which will be expensive, complicated, and time-consuming. As noted above, the core components of an effective MD/HD ZEV program include significant public investments in ZEV infrastructure build-out and in

ZEV-purchase incentives. The ACT Rule does not include those necessary program elements, and so will not result in an effective ZEV program for MD and HD ZEVs.

New York's commercial vehicle market includes many distinct segments that each require unique vehicle configurations, and each application has a different level of suitability for HD and MD ZEVs. We estimate that there are at least 70 different market segments for Class 4 through 8 trucks in New York, with some applications (*e.g.,* residential parcel delivery) representing reasonable targets for electrification, while others (*e.g.,* plowing snow) are much less suitable. Any analysis of the opportunities for deploying MD and HD ZEVs in New York must consider the diverse market segments and include a robust evaluation of each one. Those segments identified as highly suitable may be considered "beachhead" markets, where zero-emission trucks can be deployed first before expanding to other market segments.

Unlike the passenger car market where purchasers select from a limited number of vehicle options, commercial fleets provide truck manufacturers with extensive and detailed vehicle specifications so their trucks will meet the particular demands of the fleets' unique operations in the most efficient and cost-effective manner. When a trucking company purchases a commercial vehicle, it is making a significant capital investment in business equipment that it expects to deploy in a manner that will return a profit. Trucks are amortized over longer time periods than cars, and they are assessed, not with regard to subjective criteria such as style and comfort, but solely on the objective basis of performance capability and cost-efficiency. Thus, truck purchasers' decisions turn on detailed up-front assessments of the customized truck's utility for the job at hand, and its purchase price, durability, operating costs, and resale value. In short, a trucking company will only invest in a new commercial vehicle when it will improve the bottom line of its business.

In light of the foregoing, the zero-emission MD and HD vehicle market in New York will require significant incentive funding until zero-emission trucks are profitable for trucking businesses. Incentives must be sufficient to offset all of the ZEV truck life-cycle costs that will exceed current commercial vehicle costs, including: (i) higher purchase prices, and increased sales taxes; (ii) operational inefficiencies (*i.e.*, it takes more ZEV trucks to perform the work of conventionally-fueled trucks); (iii) lower residual values; (iv) required investments in new maintenance facilities, training, and parts inventories; and (v) significant investments to install and maintain the necessary charging and refueling infrastructure. Additionally, incentives must be available for an extended period of time so fleets can rely on them in implementing their long-term business plans.

Of particular importance in that regard, the NY DEC, along with other State agencies, will need to address the many challenges of developing the requisite charging infrastructure to support zero-emission MD and HD battery-electric trucks —something that CARB's ACT Rule has failed to do. Charging stations must be located at fleet terminals and other depots where trucks are typically parked, and, as noted, developing that infrastructure will be complicated, expensive and time-consuming. Moreover, fleets will need to expand the charging infrastructure

over time if they plan to deploy additional battery-electric trucks. Since it may take 24 to 48 months from concept to a having a fully functional charging station in place, the NY DEC (and other State agencies) should establish a primary near-term objective of incentivizing and assisting in the development of an appropriate charging infrastructure for the identified beachhead markets to enable the near-term deployment of battery-electric commercial vehicles. Additionally, for fleet applications where fuel-cell electric vehicles may be the better option, hydrogen fueling stations will be needed.

In sum, the ACT Rule, with its unilateral ZEV sales mandates and nothing more, is not the regulatory platform on which New York should build its program to accelerate the deployment of MD and HD ZEVs.

ii) <u>CARB's Omnibus Rule is cost-prohibitive and infeasible, and should not be a component of New York's ZEV strategy</u>

The DEC also is assessing whether to adopt CARB's Omnibus Low-NO_x Regulations in tandem with the ACT Rule. EMA has commented extensively on our multiple concerns regarding the infeasibility and cost-prohibitiveness of the Omnibus Regulations, and we are attaching those comments as well for your reference. While, again, those comments are extensive, they are supported by independent expert cost-benefit analyses, and explain very thoroughly why New York should not adopt or opt-in to the Omnibus Regulations, including for the following reasons:

a. The Omnibus Regulations are cost-prohibitive, with costs exceeding monetized benefits by a factor of at least 9 in New York. Cost-prohibitive rulemakings with corresponding adverse economic and job impacts are invalid under California and New York law, and cannot qualify for a federal preemption waiver under the federal Clean Air Act (CAA).

b. CARB has provided insufficient leadtime under the Omnibus Regulations, which is manifestly unreasonable, and which (again) will disqualify CARB (and indirectly New York) from obtaining a federal CAA preemption waiver for the Omnibus Regulations.

c. The Omnibus low-NO_x emission standards and related requirements are inherently infeasible, especially since CARB is providing only two full-years of leadtime for the 2024-2026 MY standards and requirements.

d. CARB failed to demonstrate the feasibility of the proposed 2024-2026 MY and 2027 MY and later low-NO_x emission standards and related requirements.

e. The Omnibus Regulations, when coupled with the ACT Rule, would cause fleet operators in New York to accelerate their purchases of new HD vehicles before the 2025 MY, and to refrain from purchasing new HD vehicles after the 2025 MY (a "pre-buy/no-buy" response), which would significantly diminish the assumed benefits of opting-in to the CARB Regulations. If the purchase of new CARB-compliant vehicles in New York is

reduced to near-zero levels, that will similarly reduce the mandated sales of ZEV trucks under the ACT rule, since its sales mandates are set as a percentage of new conventionally-fueled truck sales. The net effect will impede rather than promote ZEV truck sales in New York.

f. The Omnibus Regulations likely will compel some HDOH engine and vehicle manufacturers to exit the California market starting in advance of the 2024 MY, which, in turn, would result in a lack of available CARB-compliant MD and HD trucks in New York, if New York opts-in to those regulations.

g. If HDOH diesel trucks are forced out of the California market as expected, that too will frustrate the implementation of the ACT Rule, since, as noted, the HD ZEV-sales mandates under that Rule are calculated as a percentage of new HD diesel truck sales, which will be significantly reduced, if not eliminated, due to the Omnibus Regulations.

For all of the foregoing reasons, and as further detailed in the attached comments, the NY DEC should not include CARB's Omnibus Regulation as an element of New York's strategy to promote the deployment of MD and HD ZEVs. CARB's Omnibus Regulations will suppress the sales of CARB-compliant conventionally-fueled vehicles, which in turn will reduce the efficacy of the ACT Rule, since, the percentage-sales requirements of that rule are based on the number of sales of conventional trucks. Thus, the net effect of CARB's Rule, if adopted in New York, is more likely to frustrate rather than foster New York's objective to accelerate ZEV truck sales.

iii) <u>New York would be better served by advocating for next-tier nationwide HDOH standards as a "bridge" to ZEVs</u>

While we do not support the DEC's potential opt-ins to California's ACT and Omnibus Regulations, EMA and its members fully recognize that zero-emission vehicles (ZEVs) are key to the future of the commercial trucking industry. Accordingly, as noted previously, EMA member companies are investing billions of dollars to develop and bring to market MD and HD ZEVs. Our efforts alone, however, will not achieve success. A broad-based transition of the trucking industry to ZEVs will take a determined and concerted effort by federal and state policymakers, manufacturers, trucking fleets, utilities, and other key stakeholders. Accordingly, the primary focus of next-tier nationwide HDOH emission requirements should be on promoting a ZEV future. Among other things, that means assuring that there are adequate incentives available to assure fleet turnover and that the critically needed refueling/recharging infrastructure is available and in-place. The build-out of that infrastructure is an essential condition precedent to the implementation of any ZEV requirements.

The next-tier nationwide HDOH program can and should be built on existing regulatory structures, and should be focused on implementing performance-based standards (not technology mandates) that progressively drive greater adoption of ZEVs over time. Of critical importance and benefit, that type of national program also can and will provide significant GHG and NO_x reductions. To that end, EMA encourages the NY DEC, along with the other MOU States, to join

in EMA's collaborative work with EPA to assure the timely development of the next-tier nationwide HDOH program.

The significant nationwide GHG and NO_x reductions from an EPA nationwide HDOH program for commercial vehicles and engines would address any remaining nearer-term air quality issues in New York. To the extent that there might be other local needs to reduce emissions from NO_x "hotspots" within the State (*e.g.*, ports), those local needs could be best addressed through more specific approaches, such as targeted accelerated fleet turnover requirements (New York currently ranks 27th out of the 50 states in the deployment of 2010-compliant HD and MD trucks), alternative fuels programs, zero-emission vehicle and equipment policies at specific facilities, and other targeted incentive programs, rather than through the adverse statewide economic and environmental impacts that would result from the wholesale adoption of CARB's Omnibus program. Accordingly, New York and the other MOU States should work for the implementation of EPA's next-tier HDOH regulations as the best option for achieving their respective air quality goals.

iv) <u>The recommended roadmap to a commercial ZEV future</u>

As noted, transitioning the commercial trucking industry to ZEVs demands a strategic and concerted effort by state and federal policymakers, manufacturers, trucking fleets, utilities, and others. More specifically, successfully bridging to a medium- and heavy-duty ZEV future will require the following steps:

<u>Undertake technical and economic research to:</u>

- Determine the level of incentives needed to overcome the financial barriers to purchasing ZEVs and converting commercial fleets to zero emissions.
- Identify the funding and other potential impediments to building out the necessary electric charging/hydrogen fueling infrastructure.
- Assess the optimal commercial vehicle market segments most suitable for the near-term deployment of ZEVs; properly prioritize and allocate resources for early deployment in those market segments; and establish reasonable pathways to the broader adoption of commercial ZEVs.
- Determine the optimal long-term ZEV power source for each commercial vehicle market segment and the corresponding infrastructure needs (*i.e.*, electricity and/or hydrogen), including generation and storage.

<u>Establish practical, implementable, and effective policies to:</u>

- Incentivize trucking fleet transitions to ZEVs.
- Accelerate the turnover/retirement of older, high-emitting commercial vehicles.

- Target the commercial vehicle applications and markets most suitable for near-term transition to ZEVs.
- Fund construction of the unique charging/fueling infrastructure needed for MD and HD ZEVs, including electricity grid modernization and decarbonization.
- Implement new EPA lower-emission standards for conventionally-fueled trucks on a nationwide basis to allow for broad near-term NO_X and GHG reductions and to help manage the longer-term transition (the bridge) to commercial ZEVs.
- Utilize carbon neutral liquid and gaseous fuels for interim GHG reductions.

v) <u>Legal issues could block New York's contemplated opt-ins</u>

There are a number of legal issues that could impact New York's potential rulemakings to opt-in to CARB's regulations. A summary analysis of those issues is included as an attachment to this letter.

vi) <u>Conclusion</u>

There is no doubt that ZEVs are the future of the commercial trucking industry, and the roadmap described above identifies the realistic and necessary steps to develop and bring to market medium- and heavy-duty ZEVs. Policymakers and other stakeholders should collaborate on those targeted and holistic strategies to successfully establish a robust commercial ZEV market. In the meantime, a complementary nationwide EPA bridge program will be necessary to continue to reduce NO_x and GHG emissions from conventionally-fueled commercial vehicles. EMA and its members have already begun aggressively moving down the road toward a ZEV future. We look forward to working with the NY DEC and other stakeholders to put in place the necessary elements to ensure we reach that shared goal.

Please note that EMA is fully committed to working with the NY DEC to assist New York in its evaluation of the multiple issues involved with deploying zero-emission commercial vehicles, and in assessing why opting-in to CARB's ACT and Omnibus Regulations is not recommended. To that end, we look forward to our discussions on March 8th.

Respectfully submitted,

Timothy A. French

cc: MHDZEVPlan.Air@dec.ny.gov
Jed R. Mandel
Timothy A. Blubaugh
Steve Berry

Truck & Engine Manufacturers Association®
Bringing Clean Power to the World™

333 West Wacker Drive, Suite 810
Chicago, Illinois, 60606
Phone/Fax: (312) 929-1970
www.truckandenginemanufacturers.org

Issues That Could Preclude New York's Opt-In to CARB's ACT and Omnibus Rules

There are potential legal and procedural issues that may preclude New York from opting-in to CARB's ACT and Omnibus Low-NO_x Rules. More specifically, it appears that New York may not meet the opt-in criteria in section 177 of the federal Clean Air Act. It also appears that New York may not be able to justify the socio-economic impacts of adopting CARB's Rules as required under the applicable New York rulemaking statutes.

The Requirements of the Clean Air Act

The scope of CAA Section 177

We understand that New York is in attainment with the 2008 national ambient air quality standards (NAAQS) for ozone (75 ppb). It also appears that New York will have demonstrated attainment with the current 70 ppb ozone NAAQS through required SIP submissions by August of 2022, and will achieve full ozone NAAQS-attainment before August of 2027. In that regard, the DEC's most recent Ambient Air Quality Report confirms that the benchmark ozone levels in Regions 1 and 2 (the New York City (NYC) metro area) averaged from 69-74 ppb in 2019, that Region 3 (other than the White Plains site) was in compliance with the 70 ppb standard, and that Regions 4 through 9 were already well below the 70 ppb ozone NAAQS. Further, the "high ozone values" reported for 2020 confirm that the relevant average ozone values for the NYC metro area only exceeded the 70 ppb NAAQS in Holtsville (73 ppb), and nowhere else. Thus, it is apparent that New York is on track to demonstrate and achieve attainment well before the applicable dates in August of 2022 and 2027.

Section 177 applies only in those instances where a State that is in nonattainment with a NAAQS (i.e., for ozone) needs to include more stringent California standards as SIP measures to demonstrate NAAQS-attainment. New York is not in that situation.

The specific terms of CAA section 177 (42 U.S.C. §7507) are as follows:

> **New motor vehicle emission standards in *nonattainment* areas**
>
> Notwithstanding section 7543(a) of this title [the CAA section relating to the preemption of state standards] **any State with plan provisions approved under this part** ["Part D - Plan Requirements for Nonattainment Areas"] may adopt and enforce for any model year standards relating to the control of emissions from new motor vehicles or new motor vehicle engines and take such other actions as are referred to in section 7543(a) of this title respecting such vehicles if —
>
> (1) Such standards are identical to the California standards for which a [preemption] waiver has been granted for such model year; and

> (2) California and such State adopt such standards at least two years before commencement of such model year (as determined by regulations of the Administrator). (Emphasis added.)

The statutory language clearly indicates that the option for States to utilize section 177 is limited to those States that have EPA-approved SIPs and that need to include more stringent California standards as SIP provisions in order to bring the States' nonattainment areas into attainment with the applicable NAAQS, including for ozone. The heading to section 177 – "New motor vehicle emission standards in **nonattainment** areas" – reinforces that conclusion. In that regard, CAA section 171(2) (42 U.S.C. § 7501(2)) defines a nonattainment area to mean "for any air pollutant, an area which is designated 'nonattainment' with respect to that pollutant." Given that definition, a State that is demonstrating compliance with the NAAQS through an EPA-approved "maintenance plan" would not be eligible for an opt-in under Section 177, since the submission of a maintenance plan applies to a State "which *has attained* the national primary ambient air quality standard for that pollutant." (42 U.S.C. § 7505a.)

The Second Circuit Court of Appeals has reinforced that conclusion, noting that "[i]t was in an effort **to assist those states struggling to meet federal pollution standards** that Congress directed in 1977 that other states could promulgate regulations requiring vehicles sold in their state to be in compliance with California's emission standards." Motor Vehicle Manufacturers Ass'n v. New York State of Dept. of Environ. Conservation, 17 F.3rd 521 (2nd Cir. 1994). (Emphasis added.) "Section 177 was inserted into the Act in 1977 **so that states attempting to combat their own pollution problems could adopt California's more stringent emission controls.**" Id.

The relevant legislative history of section 177 also makes it clear that opt-ins to California's mobile source standards are only available to States that need to utilize California standards to address persistent NAAQS-nonattainment issues. More specifically, as explained in the 1977 House (Report No. 95-294), CAA section 177 was initially referred to as "Section 221" in the proposed 1977 amendments to the CAA. In its explanation of Section 221 (now, Section 177), the House Committee stated that "a State which is subject to the [new] vehicle inspection and maintenance requirements [I/M] of [proposed] section 208 of the [1977 CAA amendments] is authorized to adopt and enforce new motor vehicle emission standards which are identical to California standards for which a waiver is given under section 209(b) of the act." (H.R. 95-294, p. 431.) Significantly, the application of proposed section 208, which mandated that States adopt I/M programs, was expressly limited to the "29 air quality regions **predicted to exceed the national primary ambient air quality standards** for carbon monoxide (CO) or for photochemical oxidants." In other words, the House understood and intended that the option to adopt California standards was limited to those States that would be in nonattainment but for their inclusion of California's more stringent standards in their SIPs. (Id. at 224.) The House Committee Report went on to note as follows:

> [T]he Committee is concerned that preemption [of state standards] (section 209(a) of the Act) now interferes with legitimate police powers of the States, prevents effective protection of public health, and limits economic growth and employment opportunities **in non-attainment areas for automotive pollutants.**
>
> Id. at 244 (emphasis added).

The accompanying Senate Report (S.R. 95-127) for the relevant amendments to the CAA in 1977 contained similar statements regarding the scope and availability of CAA section 177. Of particular note in that regard is the statement of Senator Anderson:

> One issue of particular concern to me is the limitation in section 209 of the waiver from the State preemption provision for automobile emission standards only for the State of California . . . . I believe, **communities and States with substantial cleanup problems** should be allowed the option of protecting the public in their jurisdiction **by requiring accelerated cleanup [through California standards]**. (S.R. 98-127, p.93.) (Emphasis added.)

Thus, the relevant House and Senate Reports demonstrate that the potential opt-ins envisioned under what would become CAA section 177 were intended to apply only to those States that were still predicted to be in nonattainment with the NAAQS, and so were compelled to adopt California-like mobile sources standards as components of their accelerated NAAQS-attainment efforts, specifically as plan provisions in their SIPs. The underlying premise for California's ability to seek a waiver of federal preemption under section 209(b) of the CAA is that the State faces "compelling and extraordinary" air quality challenges. (42 U.S.C. §7543(b)(1)(B).) That same premise carries over under section 177 for potential opt-in States as well.

Finally, EPA's recent "SAFE" rulemaking (84 FR 51310, Sept. 27, 2019) includes a detailed review of the scope and intent of section 177 – a review that is highly relevant since EPA is the federal agency charged with implementing the preemption provisions of the CAA. In that rulemaking, EPA states as follows:

> Congress added CAA section 177 in the 1977 Clean Air Act amendments cognizant that states might need to address air pollution within their boundaries similar to California but were otherwise preempted under CAA section 209(a) from setting new motor vehicle and engine standards . . . Relevant legislative history identifies CAA section 177 as a means of addressing the NAAQS attainment planning requirements of CAA section 172, including the specific SIP content and approvals criteria for EPA.
>
> . . . [T]he text, placement in Title I, and the relevant legislative history are all indicative that CAA section is in fact intended for NAAQS attainment planning. (84 FR 51350-51.)

It is clear from all of the foregoing that a State's opt-in to California regulations under Section 177 is authorized only when the California regulations at issue are necessary components of the State's NAAQS attainment demonstration.

New York's attainment status

New York's progress and schedule to achieve the 70 ppb ozone NAAQS likely cannot justify opting-in to CARB's Regulations. As detailed in New York's 2019 Air Quality Report (AQR), 6 out of 9 of New York's Conservation Administrative Regions already meet the 70 ppb ozone NAAQS. Region 3 also in in compliance, other than for the single site at White Plains.

And Regions 1 and 2 in the NYC metro area are already near compliance, with ozone values ranging from 69-74 ppb. Significantly, ozone levels continued to go down in 2020.

More importantly, New York will need to demonstrate attainment with the 70 ppb ozone NAAQS several years before any opt-in to California's ACT and Omnibus Rules could take effect. The DEP currently anticipates that any potential opt-ins to CARB's Rules would not take effect until the 2025 model year. Significantly, that timing is **after** the date (August of 2022) by which New York must demonstrate attainment.

Accordingly, it appears that New York will not be able to rely on any potential opt-ins to demonstrate attainment with the current ozone NAAQS, and in fact, is obligated to demonstrate attainment several years before the contemplated opt-ins would even take effect, let alone result in significant reductions in ozone-precursor emissions. The net result is that since New York does not need and cannot use opt-ins to CARB's Rules as SIP provisions to demonstrate ozone attainment, New York likely is not authorized to opt-in to those Rules under CAA section 177.

CARB's GHG standards

In the SAFE Rule, EPA directly addressed the question of whether CAA section 177 authorizes States to opt-in to CARB regulations directed at the reduction of greenhouse gas (GHG) emissions, as opposed to criteria pollutants for which States have specific attainment obligations under the CAA. EPA has concluded that States cannot use section 177 to adopt CARB GHG-oriented regulations. More specifically, after discussing the same legislative history highlighted above, EPA concluded that "CAA section 177 is in fact intended for NAAQS attainment planning and not to address global air pollution." (84 FR 51351.) Since CARB's ACT Rule is a regulation principally aimed at reducing GHGs, as would be New York's opt-in rulemaking, New York is not authorized to opt-in to the ACT Rule under CAA section 177.

The Applicable New York Rulemaking Statutes

In any rulemaking, the DEC must prepare a detailed economic impact analysis of the proposed rule, along with a corollary regulatory flexibility analysis. (See New York State Administrative Procedures Act, Article 2.) A thorough benefit-cost analysis (BCA) is a core component of what is required. We believe that the costs of New York's opt-in to CARB's ACT and Omnibus Rules would far outweigh any putative benefits.

EMA previously engaged independent experts to assess the costs and benefits of CARB's Omnibus Rule, both as applied in California and as potentially applied in the other 49 States. ACT Research assessed the incremental costs of CARB' Rule on a per-truck basis, and NERA Economic Consulting quantified the potential corresponding public health benefits on a per-truck basis. (Copies of ACT's and NERA's Reports are exhibits to EMA's comments on CARB's Omnibus Rule, which are included with this letter.)

ACT found that, based on new truck sales volumes in California, CARB's Omnibus Low-NO_x Rule would increase the price of a new truck in California by approximately $58,000, using a 7% discount rate. Since new truck sales volumes in New York are substantially less than in California, using that per-truck cost increase to assess the cost of New York's potential opt-in to the Omnibus Rule is a conservative approach.

On the benefits side, NERA quantified the public health benefits (i.e., avoided premature deaths) that could be attributed to the reductions in ozone and secondary PM emissions from implementation of an Omnibus Rule, and then calculated those benefits on a per-truck basis, both for California and for States outside of California as well. For New York, those benefits amount to approximately $6,500 per-truck ($6,250 per-truck from secondary PM reductions, and $250 per-truck from ozone reductions), using a 3% discount rate.

Comparing the likely benefits and costs in New York from an opt-in to CARB's Omnibus Low-NO_x Rule yields a cost-benefit ratio (or a negative benefit-cost ratio) of approximately 9-to-1, on a conservative basis. Rulemakings that would have such inverted economic consequences cannot meet the criteria for valid administrative regulations. And that is even before the other downstream consequences of a potential opt-in are taken into account.

More specifically, ACT found that given the per-truck cost impacts of the Omnibus Low-NO_x Rule, it can be expected that truck fleet operators will accelerate their purchases of new trucks before the Omnibus Rule takes effect (a "pre-buy"), and will refrain from buying new trucks after the Omnibus Rule takes effect (a "no-buy"). The likely net result will be that the anticipated pre-buy/no-buy will shift at least 40% of the new truck market to accelerated purchases prior to the implementation of the Omnibus Rule, which will proportionally and significantly dilute any potential benefits from the CARB Rules, including under the ACT Rule, since the extent of the ZEV-truck sales mandate under that Rule is derived from the level of sales of conventionally-fueled trucks.

In addition, it can be anticipated that once the Omnibus Rule takes effect in New York, truck dealerships in the State will see their businesses suffer, long-haul fleet operators may choose to move out-of-state, and trucking-related job losses will occur. All of those adverse outcomes will only compound the already upside-down cost-benefit calculus for the contemplated opt-in.

In sum, opting-in to CARB's Omnibus Low-NO_x Rule would be cost-prohibitive. The calculus for CARB's ACT Rule is similar if not even more inverted. Since such opt-ins likely are not authorized under CAA section 177 to begin with, it seems likely that New York is not authorized to adopt and opt-in to CARB's Rules.