

ORAL ARGUMENT SCHEDULED ON SEPTEMBER 15, 2020

No. 16-1430

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

**TRUCK TRAILER MANUFACTURERS
ASSOCIATION, INC.,**

Petitioner,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,**

Respondents.

On Petition for Review of a Decision of the U.S. Environmental
Protection Agency and the U.S. Department of Transportation

**RESPONDENT-INTERVENORS' JOINT OPPOSITION TO
PETITIONER TRUCK TRAILER MANUFACTURERS
ASSOCIATION'S MOTION FOR STAY**

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INTRODUCTION

Congress mandated in the Energy Independence and Security Act (EISA) that the National Highway Traffic Safety Administration (NHTSA) develop a “fuel efficiency improvement program” designed to “achieve the maximum feasible improvement” in the fuel economy of commercial medium-duty or heavy-duty vehicles that travel the Nation’s highways. 49 U.S.C. § 32902(b). In its second-generation standards for heavy-duty vehicles, NHTSA accordingly developed fuel economy standards for the trailers that commonly transport many goods across the country. NHTSA’s trailer standards—which ensure that trailers are equipped with low-cost and fuel-saving aerodynamic equipment and efficient tires—fulfill EISA’s stated purpose of improving the fuel economy of commercial vehicles used on America’s highways.

Petitioner Truck Trailer Manufacturers Association (TTMA) seeks to stay NHTSA’s trailer standards, arguing now that those standards must be stayed because the U.S. Environmental Protection Agency’s (EPA) distinct, but jointly promulgated, trailer standards were stayed back in October 2017. But NHTSA and EPA’s standards are separately authorized and stand on their own, and thus TTMA has not come close to establishing a likelihood of success on the merits.

TTMA has likewise failed to demonstrate that its members will be irreparably harmed absent a stay of NHTSA's standards during the brief period before this Court issues a decision on the merits. Not only is TTMA's presentation of irreparable harm based on speculative assertions belied by the facts, but any alleged harm is the result of TTMA's own delay in seeking resolution of the issues raised here and its own failure to work with NHTSA and EPA to resolve implementation concerns. Moreover, any such harm is firmly outweighed by the public interest in implementing common-sense trailer improvements that significantly reduce fuel consumption by the biggest trucks on our roads—improvements that pay for themselves within two years.

Accordingly, State-Respondent Intervenors¹ and the Respondent-Intervenor Public Health and Environmental Organizations² hereby oppose TTMA's motion for a stay and respectfully urge the Court to deny it.

¹ State-Respondent Intervenors are the California Air Resources Board, and the States of Connecticut, Iowa, Massachusetts, Oregon, Rhode Island, Vermont, and Washington.

² Public Health Organization Respondent-Intervenors are the Center for Biological Diversity, Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, and Union of Concerned Scientists.

BACKGROUND

On October 25, 2016, Respondents EPA and NHTSA (collectively, “Agencies”) jointly published a final rule in the Federal Register establishing, respectively, greenhouse gas emission and fuel efficiency standards for tractor-trailers. 81 Fed. Reg. 73,478, 73,481 (Oct. 25, 2016).

NHTSA’s standards have always been scheduled to go into effect on January 1, 2021. Beginning with model year 2021, these standards require manufacturers to equip new trailers with widely-available and low-cost aerodynamic technologies that offer significant fuel savings to the manufacturers’ customers and reduce greenhouse gas emissions. These technologies include fairings (metal or plastic pieces, sometimes called “skirts,” that can attach to the front, back, and undersides of trailers to increase streamlining and reduce drag), tire-pressure monitoring systems, low-rolling-resistance tires designed to reduce energy loss, and lighter-weight standard components. 81 Fed. Reg. at 73,505. On average, the technologies will pay for themselves in fuel savings in the second year of their use. *Id.* at 73,483.

TTMA filed the instant petition for review challenging the Agencies’ respective authority to issue these regulations on December 22, 2016, almost four years ago. ECF No. 1652784. In September 2017, the Agencies filed a

motion asking the Court to hold the case in abeyance pending reconsideration of their standards. ECF No. 1693423. In response, TTMA sought a stay from this Court to prevent EPA's greenhouse gas emission standards for trailers from taking effect, as they were scheduled to do on January 1, 2018. ECF No. 1694522. EPA consented to the stay while taking no position on the merits; Respondent-Intervenors opposed. ECF Nos. 1698457, 1698824, 1698825. On October 27, 2017, this Court granted the stay of EPA's standards and ordered that the case be held in abeyance. ECF No. 1701733.

Over two years later, on December 3, 2019, TTMA filed a motion to lift the abeyance. ECF No. 1818576. On December 26, 2019, this Court lifted the abeyance, and established a briefing schedule. ECF No. 1821605. On June 18, 2020, the Court set the case for oral argument on September 15, 2020. ECF No. 1847973. TTMA, however, did not bring the present motion to stay NHTSA's standards until August 26, 2020, eight months after the Court lifted the abeyance and set a schedule for merits briefing, and less than three weeks before oral argument on the merits. ECF No. 1858510. TTMA's motion and accompanying declarations give no indication as to why it waited until December of 2019 to seek to lift the abeyance or why it waited until just before oral argument to seek this stay.

STANDARD OF REVIEW

“On a motion for stay, it is the movant’s obligation to justify the court’s exercise of such an extraordinary remedy.” *Cuomo v. NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985). A party seeking a stay “must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Nken v. Holder*, 556 U.S. 418, 434 (2009); *see also* D.C. Cir. R. 18(a)(1). The burden on the movant is high; indeed, a preliminary injunction “may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

ARGUMENT

TTMA has failed to establish any of the bases required for a stay.

I. TTMA IS UNLIKELY TO SUCCEED ON THE MERITS

A. EISA Unambiguously Requires NHTSA to Regulate the Fuel Economy of Trailers

1. Congress required NHTSA to establish fuel economy standards for certain “on-highway vehicles”—a term that unambiguously includes trailers

Congress required NHTSA to establish fuel economy standards for any “on-highway vehicle with a gross vehicle weight rating of 10,000 pounds or more.” *See* 49 U.S.C. § 32901(a)(7) (defining commercial medium-duty or

heavy-duty on-highway vehicles). Both the plain meaning of the term “vehicle” and NHTSA’s historical understanding of the term confirm that, viewed either as one-half of the tractor-trailer combination vehicle or alone, trailers meet this definition.

At the time of EISA’s enactment, Black’s Law Dictionary defined “vehicle” as “[s]omething used as an instrument of conveyance,” or “[a]ny conveyance used in transporting passengers or things by land, water, or air.” Black’s Law Dictionary (8th ed. 2004). These definitions plainly encompass trailers (and tractor-trailers) which are specifically designed to move goods on highways, and are consistent with terms like “truck” and “eighteen-wheeler,” which are commonly used to refer to tractor-trailers. Notably, the only constraints Congress placed on the broad term “vehicle” involve its weight (10,000 pounds or more) and whether or not it travels “on-highway.” No one disputes that trailers satisfy both criteria.

Moreover, Congress is well aware that the term “vehicle” is broad enough to include trailers (and tractor-trailers). Before it enacted EISA, Congress had twice defined the term “motor vehicle” elsewhere in Title 49 as “a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways[.]” 49 U.S.C. § 30102(a)(7); 49 U.S.C. § 32101(7). Despite knowledge of these

definitions, Congress did not explicitly exclude trailers from its definitions in EISA; rather, it chose to use the expansive term “vehicles,” limited only by weight (“10,000 pounds or more”) and location of travel (“on-highway”). See 49 U.S.C. § 32901(a)(7), (19).

Contrary to TTMA’s arguments, Congress’s use of the term “gross vehicle weight rating” instead of “gross combination weight rating” in this definition *confirms*, rather than undermines, the breadth of NHTSA’s authority. Only combination vehicles, such as tractor-trailers, have a “gross combination weight rating.” 40 C.F.R. § 571.3.³ But *all* vehicles in this category, including trailers and tractor-trailers, have “gross vehicle weight rating[s].” Congress’s use of the broader, more generally applicable weight rating confirms that Congress intended its definition to be *inclusive*. Indeed, as written, the definition encompasses the entire category of medium- and heavy-duty vehicles, many of which are not combination vehicles (e.g. bucket trucks, pickup trucks, garbage trucks, and delivery vehicles). It also includes trailers, which meet the definition on their own, and as combination tractor-trailers.

³ NHTSA incorporated these same definitions into its regulations under EISA. 49 C.F.R. § 523.2.

The “context” of the “overall statutory scheme” further demonstrates Congress’ unambiguous intent that the term “vehicles” includes trailers. *See PDK Labs. Inc. v. DEA*, 362 F.3d 786, 796 (D.C. Cir. 2004). Congress enacted the relevant portions of EISA to fill regulatory gaps in the fuel economy program established under the Energy Policy and Conservation Act of 1975 (P.L. 94-163) “to reduce fuel consumption,” and thereby simultaneously reduce both American dependence on foreign oil and the cost of gasoline. *See* S. Rep. No. 110-278, at 2, 5 (April 7, 2008). Consistent with these purposes, EISA directs NHTSA to create a “fuel efficiency improvement program” for “commercial medium- and heavy-duty on-highway vehicles” that will achieve the “maximum feasible improvement.” 49 U.S.C. § 32902(k)(2).

Specifically, Congress directed NHTSA to comprehensively consider the practical aspects of commercial highway vehicle activity before developing its regulations, including “the appropriate metric for measuring and expressing commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency performance,” which takes into consideration “the work performed by such on-highway vehicles and work trucks and types of operations in which they are used.” 49 U.S.C. § 32902(k)(1)-(2). In so doing, Congress rejected the incorporation of the existing measure of

“fuel economy,” developed for light-duty vehicles, into the medium- and heavy-duty vehicle standards, because the existing definition did not take into consideration “the work performed” by these larger, industrial vehicles. *See* 49 U.S.C. § 32901(a)(11). Taking into consideration the “work performed” by tractor-trailers, trailers have “fuel economy,” because they require the consumption of fuel to convey goods. Thus, NHTSA must regulate both parts of the tractor-trailer to achieve the “maximum feasible improvement” from this category of vehicle.

2. TTMA’s arguments that trailers are not “vehicles” lack merit

TTMA’s primary challenge to NHTSA’s authority to regulate trailers is the assertion that trailers do not “use fuel.” Mot. at 8-11. This is both irrelevant and incorrect. As discussed above, Congress constrained the expansive term “vehicles” only by weight and location of travel, and made no reference to the use of fuel. 49 U.S.C. § 32901(a)(7). And in any event, trailers do “use” fuel in fulfilling their intended purpose of transporting goods. *See supra* at 9. Indeed, no one disputes that a tractor-trailer uses more fuel than a tractor by itself or that the tractor by itself cannot fulfill its intended use.

TTMA's argument that the regulation of trailers is equivalent to the regulation of wheelbarrows, car-top carriers, and bicycle racks is unfounded. Mot. at 10-11. Unlike the trailer, these items obviously do not satisfy the elements of the definition of a "medium- and heavy-duty on-highway vehicle," and they are not one-half of a combination vehicle that only serves its intended function when it is combined, as the tractor and trailer segments are for the tractor-trailer.⁴ And the fact that EISA separately authorizes a program for rating the fuel-efficiency "effect[s] of tires," underscores that Congress wanted a comprehensive approach to reducing fuel consumption and understood tires could make important contributions to maximizing the fuel-efficiency of on-highway vehicles; it does not suggest that Congress intended to exclude trailers.

Finally, Congress's use of the term "truck" in the legislative history and an uncodified section of EISA does not demonstrate Congress's intent to exclude the trailer from the definition of "vehicle." Mot. at 13. Contrary to TTMA's assertion, the plain meaning and common usage of the word "truck" includes tractor-trailers. The National Academy of Sciences in fact understood this word in its colloquial sense, and used it interchangeably with

⁴ Notably, only one of TTMA's slippery-slope examples even has wheels.

the word “tractor-trailer.” *See, e.g.*, ECF No. 1846320 at JA289. And in any event, when it drafted the codified sections of EISA, Congress chose to use the broader word “vehicle,” instead of truck. 49 U.S.C. § 32902(k); *see also id.* § 32902(b). This, again, demonstrates Congress’s intent that NHTSA adopt fuel economy standards for *all* vehicles meeting the weight and location criteria.

B. NHTSA’s Standards Are Severable From EPA’s Standards

1. The severability doctrine does not apply

TTMA bases its argument that the Agencies’ standards are not severable on the purported principle that “[w]hen this Court *invalidates* a regulatory provision, its default remedy is to vacate the entire rule absent an indication that the invalid provision is ‘severable.’” Mot. at 4 (emphasis added). This turns severability on its head. *See Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (a provision is not severable if there is “substantial doubt” that the agency would have adopted the severed portion on its own). And in any event, this alleged principle is not applicable here because the Court has not in fact invalidated EPA’s regulatory provisions; it merely stayed EPA’s standards, after EPA declined to take a position on the merits.

Moreover, NHTSA's authority is entirely independent of EPA's. As each Agency's trailer standards "implement [their] respective statutory obligations"—the Clean Air Act's requirement that EPA regulate pollutants that endanger human health and welfare, and EISA's directive that NHTSA regulate fuel economy—the invalidation of one set of regulations cannot invalidate the other. 81 Fed. Reg. 73,644-73,645, 73,969; *see also Massachusetts v. EPA*, 549 U.S. 497, 531-32 (2007) (DOT and EPA have "independent" rulemaking authority even if there is some "overlap" between their obligations). None of the cases TTMA cites supports the theory that a defect in one agency's regulation may invalidate a regulation issued by a different agency pursuant to its independent statutory authority. *See Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014) (involving provisions of one agency's regulations); *Davis Cty.*, 108 F.3d at 1459 (same).

2. The Agencies intended the rules to be severable

Even if the severability analysis applied, the separate standards are severable. As this Court has repeatedly explained, "[t]he question of whether an agency order is severable turns on the agency's intent." *Sierra Club v. FERC*, 867 F.3d 1357, 1366 (D.C. Cir. 2017). Contrary to TTMA's assertion, there is no need to "speculate" about the Agencies' intent here. *See Mot.* at 7. The Agencies made the independence and severability of

their standards clear: “the NHTSA fuel consumption standards are independent of the EPA greenhouse gas standards and vice versa” and therefore “[t]he agencies . . . regard each of these standards as legally severable.” *See* JA 421; *see also* 81 Fed. Reg. 73,644-73,645, 73,969.

The fact that EPA and NHTSA “worked in close partnership” to “create a single, effective set of national standards” (Mot. at 6-7 (citing 81 Fed. Reg. at 73,479)) does not negate the Agencies’ clear intent that their regulations operate independently and does not demonstrate that either agency would have adopted a different regulation but for the other’s rule. Although the Agencies aligned compliance with their standards to “avoid inconsistency,” *Massachusetts*, 549 U.S. at 532, and collaborated on a joint proposal, their two standards ultimately arise from different authority and have different goals.⁵ This Court should decline TTMA’s invitation to apply severability analysis to independently authorized standards adopted by two different agencies solely on the basis of the Agency’s cooperative efforts where the Agencies’ expressly intended the standards to be severable.

⁵ Contrary to TTMA’s assertion, the Agencies do not “treat[] ‘emissions and fuel consumption’ as a unitary concept.” Mot. at 7. As explained in *Massachusetts v. EPA*, 549 U.S. at 531-32, EPA’s “statutory obligation” to regulate greenhouse gas pollution is “wholly independent of DOT’s mandate to promote energy efficiency.”

3. NHTSA's rules can function independently in the event EPA's substantive standards are invalidated

TTMA finally argues that regardless of intent, “[i]t is impossible to apply NHTSA’s trailer standards without EPA’s.” Mot. at 4. To the contrary, both the Agencies and Respondent-Intervenors have already briefed at length the ways in which the rules were intended to, and could, function independently. *See* ECF No. 1848590 at 43-44, 47-49; ECF No. 1848541 at 20-26. In their opposition to the present stay motion, the Agencies reiterate that in the absence of EPA’s rules manufacturers of regulated trailers can continue to adopt the technologies necessary to comply with NHTSA’s separate fuel efficiency standards (ECF No. 1860406 at 8-9), and that EPA may certainly still “cooperate with NHTSA to establish and verify compliance” with these standards (*id.* at 9).

Both of TTMA’s examples of how NHTSA’s regulations are inoperable while EPA’s rule is stayed miss the mark. EISA provides a role for EPA to help implement fuel economy standards in recognition of EPA’s long expertise in vehicle testing. EPA’s EISA responsibilities are separate and apart from any emission standards it promulgates under its Clean Air Act authority. 49 U.S.C. §§ 32904(a)(1), (c), (e); *id.* at § 32902(b)(1)(C); *id.* § 32902(k)(1)(A), (k)(2). Thus, EPA may review compliance values to

“mak[e] final determinations on whether vehicles . . . comply with fuel consumption standards,” regardless of the existence of EPA’s own standards.⁶ *See* Mot. at 4. And EPA can issue certificates of conformity even where it is not enforcing its own substantive standards. Nothing in this Court’s stay order addressed these obligations or authorities; rather, TTMA argued only that EPA lacked authority, *under the Clean Air Act*, to establish and enforce greenhouse gas emission standards for trailers, and the Court stayed only “[t]he EPA Final Rule . . . insofar as it purports to regulate trailers.” ECF No. 1701733.⁷

As the joint regulatory structure for establishing compliance with these regulations can still function for NHTSA’s standards in the absence of EPA’s separate standards, the existing stay of EPA’s trailer standards is not a basis on which to stay NHTSA’s rule. *See Alaska Airlines, Inc. v. Brock*,

⁶ NHTSA also “reserve[s] the right to verify separately . . . the results of any testing and measurement established by manufacturers,” enabling NHTSA to perform validation testing and calculate average fuel economy in the event EPA is unable or unwilling to do so. 49 C.F.R. §§ 535.6, 535.8.

⁷ While TTMA introduces with this motion new factual assertions regarding certificates of conformity, such extra-record submissions are not a proper consideration on the merits. *Del. Dep’t of Nat. Res. & Env’tl. Control v. EPA*, 895 F.3d 90, 102 (D.C. Cir. 2018) (“[I]t is black-letter administrative law that a reviewing court cannot consider information that was unavailable to the agency when it made its decision.”) (internal quotation marks omitted).

480 U.S. 678, 684 (1987) (courts “should refrain from invalidating more of the statute [or regulation] than is necessary”).

II. TTMA’S ALLEGED INJURIES DO NOT SATISFY THIS COURT’S DEMANDING STANDARDS FOR IRREPARABLE HARM

The Court has before it not only demonstrations by EPA and Respondent-Intervenors that TTMA is unlikely to succeed on the merits, but full merits briefing demonstrating why the petition for review should be denied. Because a likelihood of success is a necessary prerequisite to a stay, the Court need not address the other factors. In any event, TTMA has not made the other necessary showings, including the requisite showing of irreparable harm that is “certain, great, actual ‘and not theoretical.’” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

A. TTMA’s Failure to Seek Prompt Relief from this Court Created Any Exigency on Which TTMA Now Relies for Extraordinary Relief

TTMA argues that its members will be irreparably harmed if NHTSA’s trailer regulations are not stayed pending a decision on the merits in this case, because they must either “refuse to sell trailers” or take orders for trailers they cannot certify while EPA’s regulations remain stayed. Mot. at 16-17. While Respondent-Intervenors dispute the factual basis underlying these alleged harms, *infra* at 18-22, to the extent this dilemma exists, it

arises out of TTMA's own delay in seeking resolution of these issues. Thus, a stay should not issue. *See, e.g., Newdow v. Bush*, 355 F.Supp.2d 265, 292 (D.D.C. 2005) (explaining that “[a]n unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm”).

TTMA initiated this case over three-and-a-half years ago in December 2016 yet did not seek to brief the merits until December 2019, agreeing to hold the case in abeyance for years. ECF No. 1818576. During all of that time TTMA could have sought a decision on the merits that would have forestalled the need to seek emergency relief. It was unreasonable for TTMA to believe that a complex case, involving two different agencies' regulations and two sets of respondent-intervenors, would be fully briefed and decided by September 2020 when TTMA only sought to lift the abeyance and establish a briefing schedule in December 2019. Thus, any alleged harms that TTMA's members may now incur by having to prepare to comply with regulations that may “later [be] withdrawn or held unlawful” are harms that could have been avoided had TTMA sought prompt resolution by this Court.

Even after moving to lift the abeyance in December 2019, TTMA allowed over nine months to pass before bringing this motion. Notably, all

of the harms that TTMA claims in the present motion were known or foreseeable at the time TTMA sought to lift the abeyance, if not before. This is evident from the fact that TTMA repeats many of the same harm allegations in this motion that it made in asking for a stay of EPA's regulations nearly three years ago. *See* ECF No. 1694522 at 13-18. This militates even more strongly against a finding of irreparable harm. *See Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (injunction not merited where party seeking it had knowledge of pending nature of the alleged harm but delayed seeking relief).

B. TTMA Fails to Demonstrate Irreparable Harm Arising from the Stay of EPA's Trailer Standards

TTMA argues that due to the stay of regulations TTMA itself obtained in 2017, EPA is not currently issuing "certificates of conformity to manufacturers seeking to comply with EPA's standards," nor "certifying new aerodynamic equipment, tire, or tire-pressure monitoring equipment," and thus that its members must either "refuse to sell trailers or take orders for trailers they cannot certify, risking noncompliance and associated penalties." Mot. at 17-18. This alleged harm arises directly out of TTMA's delay in seeking relief on the merits. EPA's regulations are stayed only until

this Court issues its decision, at which point any uncertainty in the certification process will be resolved.

Moreover, EPA may issue certificates of conformity and certify new equipment even where it is not enforcing its own substantive standards. *See discussion supra* at 14-15. Indeed, it is required to do so under the regulations themselves, which do not provide for EPA to ignore or refuse to process applications. *See* 40 C.F.R. § 1036.255. Respondent-Intervenors thus dispute the Agencies' assertion that the certificate of conformity requirement is a "portion of the rule dependent on EPA's statutory authority to promulgate greenhouse gas standards" (ECF No. 1860406 at 10, fn.1), and maintain that EPA's obligations in this respect are not subject to the existing stay. Any harm here arises not from the regulations themselves, but from EPA's failure to implement its responsibilities under those regulations.

If either TTMA or EPA had any concerns that—despite the absence of any such language in the stay order—this Court's stay of EPA's Clean Air Act regulations had the additional effect of preventing EPA from performing its distinct responsibilities under EISA to certify conformity with NHTSA standards, they should have sought clarification from this Court. EPA's failure to implement its responsibilities, and TTMA's failure to press this issue with the agency or this Court, should not be a basis for staying

NHTSA's standards. Indeed, the scenario here is a troubling one that should not be rewarded, lest agencies and regulated entities bootstrap non-enforcement of duly-promulgated rules into grounds for injunctions while bypassing rulemaking requirements.

C. TTMA Fails to Demonstrate Irreparable Harm Based on Market Impact

TTMA's assertions that its members will lose business and market share are both factually and legally inadequate. TTMA fails to explain how it can lose market share in a market its members nearly entirely control (*see* Sims Decl. at ¶ 2 (explaining TTMA's members manufacture over 90% of the heavy-duty trailers in the United States); Walsh Decl. at ¶ 50), or demonstrate how any loss of sales is caused by the trailer standards, as opposed to unrelated factors impacting the market, including the effects of the COVID-19 pandemic. *See, e.g.*, Harris Decl. at ¶ 8; Carter Decl. at ¶ 2; Walsh Decl. at ¶¶ 42-45. And none of the declarants offer "concrete estimates regarding lost revenues, customers, or market share." *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 212-13 (D.D.C. 2012); *see also Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (injuries must be "actual 'and not theoretical'"). TTMA has not met its burden of showing any loss in sales volume would be ameliorated by a stay.

D. TTMA Fails to Demonstrate Irreparable Harm Based on Compliance Costs

The compliance costs asserted by TTMA—that members will have to redesign their trailers, hire new employees to install aerodynamic equipment and comply with reporting requirements, and incur costs to store the equipment, Mot. at 19-20—likewise do not satisfy TTMA’s burden. A showing that a regulated party will incur the costs ordinarily incurred in complying with a regulation while that regulation is under review is typically insufficient to support a finding of irreparable harm. *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 42 (D.D.C. 2000); *see also Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) (“[O]rdinary compliance costs are typically insufficient to constitute irreparable harm.”); *Am. Hosp. Ass’n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) (“[I]njury resulting from attempted compliance with government regulation ordinarily is not irreparable harm.”). Moreover, TTMA ignores that if this Court determines NHTSA’s regulations are authorized, TTMA will need to comply with them by January 1, 2021; incurring these costs now is thus necessary to ensure TTMA will be in compliance.

As a factual matter, the trailer standards’ compliance costs are minimal when considered in the context of the overall costs of

manufacturing a trailer, and even less when viewed through the lens of the trailer manufacturers' annual revenues. *See* Walsh Decl. at ¶¶ 18-30, 55. The Agencies specifically designed these standards to utilize widely-available, cost-effective, “bolt-on” technologies. *Id.* at ¶¶ 18-30. And the minimal costs of these changes—including storage and facility costs—will ultimately be borne by TTMA's customers, who are expected to recoup these costs in fuel savings within six months to two years. *Id.* at ¶¶ 30, 51-54. And indeed, TTMA concedes that many of its members are already providing this equipment as part of their regulation business. *See, e.g.,* Sims Decl. at ¶ 8; Harris Decl. at ¶ 10; Walsh Decl. at ¶ 39.

TTMA has not demonstrated that NHTSA's trailer standards would result in the certain, great, and imminent harm this court requires it to show to issue a stay. *Wis. Gas Co.*, 758 F.2d at 674.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST WEIGH AGAINST TTMA'S REQUESTED STAY

In determining whether a stay is appropriate, a court must balance any hardship the stay applicant has demonstrated against the hardships that other litigants and the public will endure should the stay be granted, and should decline to grant a stay when doing so would “visit similar harm on other interested parties,” even when a stay would result in irreparable harm to the

party that requested it. *Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982); *see also Mexichem Specialty Resins, Inc. v. Env'tl. Prot. Agency* 787 F.3d 544, 557 (D.C. Cir. 2015) (courts must consider “the interests of . . . stake holders who supported the rule and who . . . stand to suffer harm if the rule is enjoined”).

The trailer standards that TTMA seeks to stay are a cost-effective, easily implemented way to improve fuel efficiency, and thereby reduce reliance on oil in the transportation sector, which accounts for more than 70 percent of the oil used in the United States. 81 Fed. Reg. at 73,479. Delaying implementation of these fuel economy standards will delay adoption of technologies proven to reduce expenditures on fuel, and thus cause unnecessary harm to TTMA’s customers and ultimately, consumers. And delay undermines Congress’s stated purpose of “conserv[ing] energy” and “provid[ing] for [the] improved energy efficiency of motor vehicles.” Pub. L. No. 94–163, § 2, 89 Stat. 871 (1975); *see United States v. Oakland Cannabis Buyers’ Co-Op*, 532 U.S. 483, 497 (2001).

TTMA speculates that NHTSA’s trailer standards would have little real world effect because, supposedly, their customers are already demanding fuel-efficient improvements where they are beneficial. Mot. at 22. But while EPA and NHTSA recognized that there is a market trend

toward adopting the technologies required by the trailer standards, the detailed analysis in the record confirms that the rule will ultimately secure substantial fuel savings (as well as emissions reductions) much sooner than if the rule were not in effect. *See* 81 Fed. Reg. at 73,504, 73,655-656, 73,910, 73,912; Walsh Decl. at ¶¶ 46-59.⁸

TTMA's professed "safety concerns" are likewise contradicted by the record. Mot. at 23. Contrary to TTMA's speculation that implementation of the rule will result in a net increase in overall vehicle miles travelled, with corresponding increases in fuel consumption and in the average number of accidents, the Agencies estimated that the implementation of the trailer standards will result in a 9% fuel savings by model year 2027 (*see* 81 Fed. Reg. at 73,482), and that the rule's incentives for weight reduction would "offset safety concerns from added weight of aerodynamic devices," and may even "produce a net safety benefit in the long run due to the potentially

⁸ While the Agencies acknowledged that the fuel economy benefits are greater for tractor-trailers operating at higher speeds, they accounted for this in their modeling and determined that the technologies would generate net benefits even at slower speeds. 81 Fed. Reg. at 73,662-663. In determining the "pay-back" period—how long it would take aerodynamic technologies to pay for themselves in fuel savings—the Agencies projected that all trailers would achieve lifetime fuel savings equal to or greater than the cost of the technologies. *Id.* at 73,663. *See also* Walsh Decl. at ¶ 31.

greater amount of cargo that could be carried on each truck as a result of trailer weight reduction” (*id.* at 73,642).

A stay of NHTSA’s standards would postpone implementation of a highly cost-effective measure for improving fuel economy with no discernible benefit to the public.

CONCLUSION

For the foregoing reasons, TTMA’s motion to stay implementation of NHTSA’s fuel economy standards applicable to trailers should be denied.

DATED: September 11, 2020

Respectfully submitted,

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⁹ For purposes of ECF-3(b) of this Court’s Administrative Order Regarding Electronic Case filing (May 15, 2009), counsel for the California Air Resources Board hereby represents that the other parties listed in the signature blocks have consented to the filing of this memorandum.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume requirements of Fed. R. App. P. 27(d)(2)(C) because it contains 5,161 words, excluding the parts of the filing exempted under Fed. R. App. P. 32(f), according to Microsoft Word.

Dated: September 11, 2020

/s/ Caitlan McLoon
CAITLAN MCLOON
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Opposition to Petitioner Truck Trailer Manufacturers Association's Motion for Stay on all parties via the Court's electronic case filing system.

Dated: September 11, 2020

/s/ Caitlan McLoon
CAITLAN MCLOON
Deputy Attorney General

ORAL ARGUMENT SCHEDULED ON SEPTEMBER 15, 2020

No. 16-1430

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

**TRUCK TRAILER MANUFACTURERS
ASSOCIATION, INC.,**

Petitioner,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,**

Respondents.

On Petition for Review of a Decision of the U.S. Environmental
Protection Agency and the U.S. Department of Transportation

**DECLARATION OF MICHAEL P. WALSH IN SUPPORT OF
RESPONDENT-INTERVENORS' JOINT OPPOSITION TO
PETITIONER TRUCK TRAILER MANUFACTURERS
ASSOCIATION'S MOTION FOR STAY**

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

DECLARATION OF MICHAEL P. WALSH

I, Michael Walsh, declare as follows:

1. I am a mechanical engineer who has spent 50 years working on issues related to motor vehicle pollution. I received a Bachelor of Science degree from Manhattan College in 1966 and pursued graduate study at Princeton University from 1969 to 1970.

2. I am currently an independent technical consultant working with governments and industries around the world, providing recommendations on effective strategies to reduce pollution associated with the transportation sector. Previously, I directed motor vehicle pollution control efforts for both the City of New York and for the U.S. EPA. I also co-chaired the EPA's Mobile Sources Technical Advisory Committee for 14 years.

3. During my tenure at EPA, I served as Deputy Assistant Administrator for Mobile Source Air Pollution Control. In that role, I led the development of air pollution control standards applicable to medium- and heavy-duty vehicles, including the development of a more realistic emissions testing procedure as well as the world's first diesel particulate standard.

4. After leaving EPA, I became an independent consultant advising governments and industry on motor vehicle pollution control issues, including issues related to heavy-duty vehicles. I helped found the International Council on Clean Transportation (ICCT), and I continue to advise its Board. ICCT is an organization founded to provide technical and scientific analysis to environmental regulators around the world to help improve the environmental performance of on-road, off-road, marine, and air transportation sources.

5. I have been involved in numerous other activities as well. These include serving as a consultant to the U.S. Senate Committee on Environment and Public Works during the development of the 1990 Clean Air Act Amendments; a member of the Committee for the Study of Public Policy for Surface Freight Transportation, convened by the National Research Council's Transportation Research Board; a member of the National Academy of Engineering Panel on the Future of the Automobile in China; and a member of the Independent Review Panel for EPA's 2007 Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements.

6. I have been invited to testify before the U.S. House of Representatives and have written several technical papers regarding heavy-duty vehicle emissions. I have also authored papers and made presentations regarding the transportation sector's significant contribution to climate change. I have contributed to the work

of the Intergovernmental Panel on Climate Change (IPCC) and was recognized by the IPCC President in association with the 2007 Nobel Peace Prize as an individual who has “contributed substantially to the work of the IPCC over the years.”

7. I have received EPA’s Lifetime Individual Achievement Award and the California Air Resources Board’s Haagen-Smit Award, given in recognition of significant career accomplishments in the air quality field. In 2005, I was selected as a MacArthur Fellow for my work designing and implementing innovative, cost-effective programs to improve air quality across the globe. In 2009, I received the Silver Magnolia Award from the City of Shanghai, given to foreigners in recognition of their contributions to Shanghai’s development, and in 2010, I received the Friendship Award from China, which is the country’s highest award for international experts.

THE HEAVY-DUTY TRACTOR AND TRAILER ARE DESIGNED AND OPERATED AS AN INTEGRATED VEHICLE.

8. From a design, engineering, and operational standpoint, heavy-duty tractors and trailers function as an integrated vehicle, designed to haul cargo together. For instance, heavy-duty tractors have engines that are sized and optimized to haul a cargo-loaded trailer and often have aerodynamic roof devices designed with trailer height in mind to reduce tractor-trailer fuel consumption. Trailers are likewise designed to be used in tandem with a tractor, and indeed, the sole purpose of the trailer is to be pulled behind a tractor.

9. As NHTSA explained in the final Phase 2 rulemaking, trailers are not merely coupled with tractors for occasional use; they are one-half of the tractor-trailer vehicle and are essential to the commercial function of that vehicle.¹ Indeed, operating a tractor without a trailer (“bobtail”) is inefficient, costly, and potentially dangerous, and companies endeavor to eliminate any such operation. Bobtails are more difficult to maneuver and brake. Without a trailer attached there is very little weight over the rear axle of a bobtail, reducing the braking power and resulting in a longer braking distance even though they weigh less. Having all of the weight over the front wheels of bobtail trucks also make them skid out in tight turns.²

**TRAILERS ACCOUNT FOR SIGNIFICANT FUEL CONSUMPTION AND NHTSA’S
TRAILER STANDARDS WILL DELIVER IMPORTANT FUEL SAVINGS.**

10. Tractor-trailers’ integrated design is clear when it comes to fuel efficiency: trailer design can contribute substantially to tractor-trailer fuel efficiency.

11. Given the substantial fuel consumption associated with trailers and the readily available technologies to reduce their fuel consumption, discussed more

¹ Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2, 81 Fed. Reg. 73,478, 73,521 (Oct. 25, 2016) [hereinafter HD GHG Phase 2 Rule].

² Federal Motor Carriers Safety Administration, “Commercial Driver License Manual” 6-1. See <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/2005%20CDL%20Driver%20Manual%20-July%202014%20-%20FINAL.pdf>.

fully below, NHTSA adopted trailer standards in the Phase 2 Heavy-Duty Rule.

The agency projects that full implementation of the trailer standards in model year (MY) 2027 will achieve fuel consumption reductions of up to 9 percent compared with the baseline scenario in which no regulatory program is implemented.³

12. Compliance with the trailer standards will also deliver financial benefits to purchasers of trailers in the form of fuel savings. In total, the trailer standards will save operators billions of dollars in fuel costs.⁴

TRAILER STANDARDS APPLY ONLY TO CERTAIN TRAILER TYPES, FOR WHICH APPLICATION OF TECHNOLOGIES CAN REDUCE FUEL CONSUMPTION.

13. The trailer standards recognize there is variability in the trailer market; thus, the standards apply only to certain trailer types whose design characteristics facilitate application of cost-effective efficiency technologies. The rule divides trailers into two general categories: box vans and non-box trailers.

14. Box vans, the most ubiquitous type of trailers representing approximately 70 percent of the market,⁵ have an enclosed cargo space that is permanently attached to the trailer chassis. These trailers, especially long box vans

³ *Id.* at 73,648.

⁴ U.S. EPA, EPA-420-F-16-044, EPA and NHTSA Adopt Standards to Reduce Greenhouse Gas Emissions and Improve Fuel Efficiency of Medium- and Heavy-Duty Vehicles for Model Year 2018 and Beyond (2016).

⁵ EPA & NHTSA, EPA-420-R-16-900, Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles – Phase 2: Regulatory Impact Analysis 1-3 (2016), Docket ID: EPA-HQ-OAR-2014-0827-2345 [hereinafter HD GHG Phase 2 RIA].

(i.e., vans longer than 50 feet), tend to be used a greater percentage of the time in long-haul applications such that technologies that save fuel can deliver even greater benefits.

15. NHTSA subcategorized box vans into those that are greater than 50 feet long (long box vans) and those that are 50 feet and shorter (short box vans). Box vans of either length with self-contained cooling and/or heating systems are considered refrigerated vans, and vans without such systems are considered dry vans. NHTSA recognized that because box vans shorter than 50 feet generally travel shorter distances at lower speeds, these trailers would not benefit from fuel saving technologies to the same degree as longer vans, and so the agency adopted less stringent standards for short box vans.⁶ Similarly, NHTSA adopted less stringent standards for box vans with equipment that may inhibit application of aerodynamic technologies.⁷

16. The trailer standards consider all trailers that are not box vans to be non-box trailers and include standards for only three specific types of these trailers: tankers, flatbeds, and container chassis. NHTSA determined that applying trailer efficiency technologies to these trailers would deliver significant fuel savings.

17. The standards exclude all other types of non-box trailers based on their unique physical characteristics and intended uses. The agencies recognized

⁶ HD GHG Phase 2 Rule, *supra* note 1, at 73,645.

⁷ *Id.* at 73,645–46.

that these features might not be compatible with some of the technologies required by the rulemaking.⁸ They also excluded trailers that are intended to haul very heavy loads, even if those trailers are of a type that would otherwise be regulated, such as box vans.⁹

THE TRAILER STANDARDS ARE BASED ON PROVEN, LOW-COST, HIGHLY EFFECTIVE TECHNOLOGIES.

18. Trailer manufacturers can meet the 2021 standards through the use of a combination of different types of technologies that improve trailers' efficiency: aerodynamic technologies such as side skirts and tails; tire technologies such as lower rolling resistance (LRR) tires, automatic tire inflation systems (ATIS), and tire pressure monitoring systems (TPMS); and weight reduction technologies, or the use of lighter weight components.

19. These proven, off-the-shelf technologies are in wide-spread use and trailer manufacturers have been deploying many of them for over a decade. They are the same technologies that manufacturers would have used to meet the 2018 standards. The 2021 standards require only a modest additional penetration of a combination of these technologies. As described above, NHTSA projects that the mix of technologies reflected in the trailer standards can reduce fuel consumption

⁸ HD GHG Phase 2 Rule, *supra* note 1, at 73,646.

⁹ *Id.* at 73,647.

by anywhere from 2 to 9 percent.¹⁰ Indeed, by 2015 trailer manufacturer Wabash National Corporation (Wabash) already offered a trailer that provides over a 10 percent improvement in fuel economy.¹¹ EPA's SmartWay Elite certified trailers reduce fuel consumption by 10 percent or more.¹² And the Department of Energy's Super Truck II Program is helping drive even greater trailer efficiency improvements.¹³ Figure 1, below, summarizes how the trailer standards deploy these technologies, and subsequent paragraphs discuss each technology in more detail.

Figure 1: Trailer Standards and Technology Requirements¹⁴

¹⁰ HD GHG Phase 2 Rule, *supra* note 1, at 73,648.

¹¹ Press Release, Wabash Nat'l Corp., Wabash National Expands Trailer Aerodynamic Solutions Portfolio with Aerofin™ XL Tail Device (Dec. 14, 2015), <http://news.wabashnational.com/wabash-national-expands-trailer-aerodynamic-solutions-portfolio-with-aerofin-xl-tail-device/>.

¹² EPA, *SmartWay Designated Tractors and Trailers*, <https://www.epa.gov/verified-diesel-tech/smartway-designated-tractors-and-trailers> (last visited September 9, 2020).

¹³ See Nat'l Acads. Of Scis., Eng'g, & Med., *Review of the 21st Century Truck Partnership, Third Report* (2015), <https://www.nap.edu/catalog/21784/review-of-the-21st-century-truck-partnership-third-report>. See also <https://dieselnet.com/news/2020/07supertruck.php>.

¹⁴ Ben Sharpe, *Truck Trailers in the U.S.: Leading from Behind*, Int'l Council on Clean Transp. (Aug. 18, 2016), <http://www.theicct.org/blogs/staff/US-truck-trailers-leading-from-behind>.

Trailer type	Technologies included in the regulation
Box-type trailers of all sizes (both dry and refrigerated trailers)	<ul style="list-style-type: none"> • Aerodynamic devices, • Low rolling resistance tires • Tire pressure management systems • Weight reduction via material substitution (optional)
Non-box trailers	<ul style="list-style-type: none"> • Low rolling resistance tires • Tire pressure management systems

20. Box Vans. For box vans, manufacturers can meet the performance-based trailer standards by applying a combination of the technologies described above. To achieve the standards, manufacturers do not have to use each of the technologies listed, but can choose among them. Fewer technologies are needed to meet the 2021 standards than the standards for later model years, with the most stringent standards taking effect in 2027.¹⁵

21. First, box van manufacturers may use technologies that reduce aerodynamic drag, including aerodynamic panels known as fairings or skirts that can be applied to the front, rear, or undersides of trailers. These technologies smooth the transition of airflow around, beneath, and beyond the trailer, reducing drag and thereby reducing fuel consumption. Trailer fairings and skirts are commercially available and in the case of box vans, these technologies are already in widespread use, with increasing adoption and decreasing costs over the past

¹⁵ See, e.g., HD GHG Phase 2 Rule, *supra* note 1, at 74,256 (codified at 49 C.F.R. § 535.5(e)(1)(iv)).

decade. Figure 2, below, shows a side skirt and boat tail installed on a 53-foot box van, used for hauling cargo on highways.

Figure 2: Aerodynamic Side Skirt and Boat Tail



22. Full aerodynamic requirements apply to box vans except for those vans that have work-performing equipment on the underside and/or rear of the trailer that would interfere with the installation of aerodynamic technologies. For these types of trailers, a separate “partial-aero” or “non-aero” standard applies.¹⁶

23. Second, box van trailer manufacturers can likewise use “lower rolling resistance” (LRR) tires to comply with the performance standards. As compared to higher rolling resistance tires, LRR tires lose less energy as they roll, leading to greater fuel efficiency. The performance standards for box vans assume that these

¹⁶ HD GHG Phase 2 Rule, *supra* note 1, at 73,643.

trailers can meet a coefficient of rolling resistance (CRR) value of 4.7 kg/ton or better in 2021, which is achievable with currently available technology.¹⁷

24. Many trailers are already equipped with these LRR tires. In fact, in an October 2014 letter to EPA, the Truck Trailer Manufacturers Association (TTMA) indicated that according to its members, about 85 percent of box vans sold at that time had tires that met EPA's SmartWay standard,¹⁸ which applies to tires with a CRR value of 5.1 kg/ton or better.

25. Third, manufacturers may reduce fuel consumption from trailers by installing systems designed to monitor and in some cases correct for low tire pressure. Underinflated tires are inefficient; they have higher rolling resistance, which leads to increased load on the engine and in turn greater fuel consumption. The performance standards for box vans assume that trailer manufacturers can install either of two different technologies to prevent sustained driving on underinflated tires: tire pressure monitoring systems (TPMS) and automatic tire inflation systems (ATIS). Both TPMS and ATIS alert the driver when tire pressure drops below a set level; ATIS go a step further and use the trailer's air brake systems to supply air back into the tires. Both systems are currently commercially available and widely in use.

¹⁷ *Id.* at 73,659.

¹⁸ *Id.*; *see also* Letter from John Freiler, Eng'g Manager, Truck Trailer Mfrs. Ass'n, to Tad Wysor, EPA Phase 2 HD GHG Trailer Team 2 (Oct. 16, 2014), Docket ID: EPA-HQ-OAR-2014-0827-0146 [hereinafter TTMA Letter].

26. Finally, though the trailer standards do not require manufacturers to reduce trailer weight, the agency provided weight reduction as a compliance flexibility that manufacturers can choose to meet the standards. Weight reduction can be accomplished by replacing trailers' structural components, such as roof posts, side posts, and floor sections, with lighter weight options, or by using lighter weight wheels and tires. Many trailer manufacturers already offer lighter weight structural components that represent an additional compliance flexibility.

27. Non-Box Trailers. For non-box trailers, NHTSA established design standards that require deployment of certain tire technologies. Aerodynamic technologies are not required for non-box trailers, due to the use and design features of these trailers.¹⁹ For covered non-box trailers, the standards require trailer manufacturers to install low rolling resistance tires that meet a less stringent CRR of 6.0 and likewise require installation of tire inflation systems.²⁰

28. These technologies are low-cost. According to NHTSA's estimates, in model year (MY) 2021, a 53-foot box van without any work-performing special components that may limit incorporation of full aerodynamic technologies will have incremental costs of \$1,081 to implement aerodynamic technologies, as well as LRR tires and a tire inflation system.²¹ A 28-foot box van with the same

¹⁹ HD GHG Phase 2 Rule, *supra* note 1, at 73,650–51.

²⁰ *Id.* at 73,652–53.

²¹ *Id.* at 73,661–62.

characteristics is expected to have costs of \$772.²² These costs are expressed as incremental costs above the average baseline costs for a new trailer of that type.

Figure 3, below, reproduced from the final Phase 2 rulemaking, sets forth incremental costs for each covered trailer type in 2021.

Figure 3²³

TABLE IV–21—TRAILER TECHNOLOGY INCREMENTAL COSTS IN THE 2021 MODEL YEAR
[2013\$]

	Long vans, full aero	Long vans, partial aero	Short vans, full aero	Short vans, partial aero	Long vans, no aero	Short vans, no aero	Non-box
Aerodynamics	\$743	\$679	\$450	\$475	\$0	\$0	\$0
Tires	17	49	9	25	49	25	23
Tire inflation system	321	609	313	457	389	195	389
Total	1,081	1,337	772	957	438	219	412

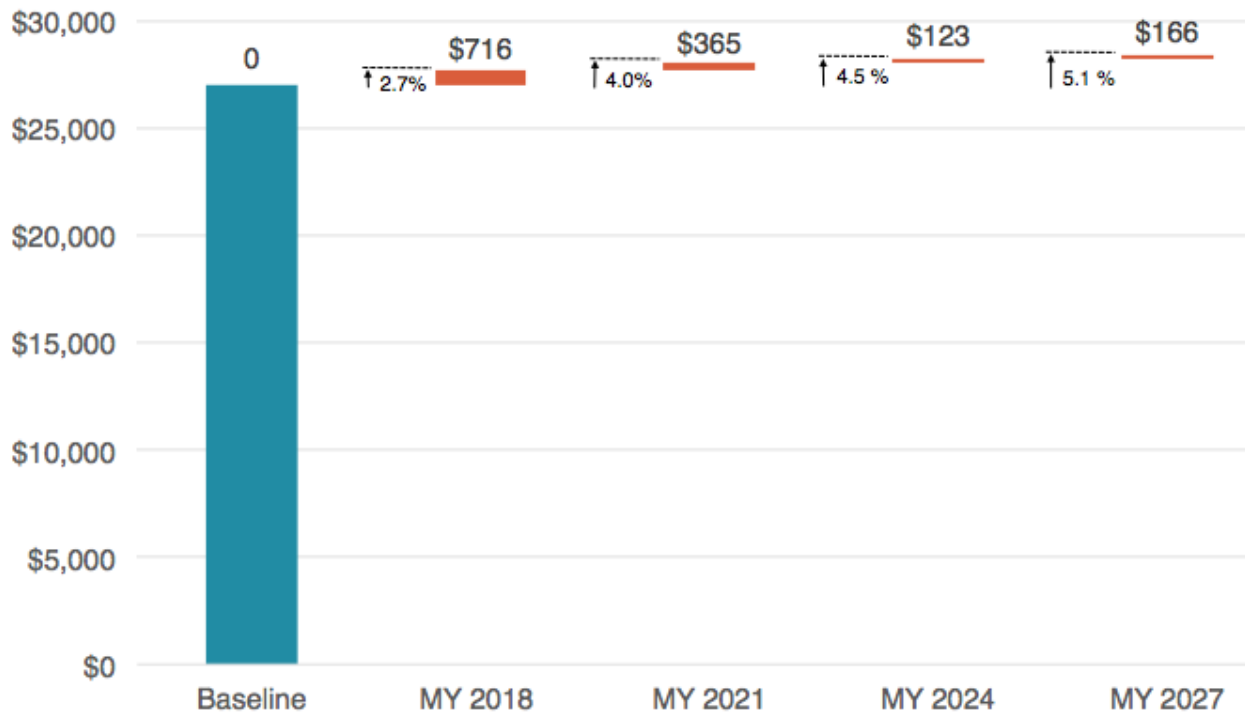
29. Figure 4, below, compares incremental costs for long dry vans in 2018, 2021, 2024, and 2027 to baseline trailer manufacturing costs. Figure 4 shows that when built to comply with MY 2021 standards, long dry van trailers have incremental costs resulting in a 4 percent increase in trailer costs above baseline cost.

²² *Id.*

²³ *Id.* at 73,662 tbl. IV–21.

Figure 4: Incremental Costs for Long Dry Van Trailers²⁴

Final Rule 81 FR 73662 October 25, 2016 [Tables IV-20, 21, 22, 23]



30. The agencies estimate that trailers meeting the standards for the final year of implementation, MY 2027, will recoup the costs of installing and maintaining efficiency technologies through fuel savings in just the second year of ownership.²⁵ And individual technologies that can be used to comply with the

²⁴ Calculations based on data contained in HD GHG Phase 2 Rule, *supra* note 1, at 73,662 tbls. IV-20 to -23. Baseline cost from Ben Sharpe, Nigel Clark and Dana Lowell, Int'l Council on Clean Transp., *Trailer Technologies for Increased HDV Efficiency* 25 (2013), http://www.theicct.org/sites/default/files/publications/ICCT_HDVtrailertechs_20130702.pdf.

²⁵ HD GHG Phase 2 Rule, *supra* note 1, at 73,510.

2021 standards offer far shorter payback periods. Side skirts, for example, can have a 6-month payback period.²⁶

31. I am aware that TTMA has claimed in its motion for stay and in supporting declarations that fuel efficiency-improving technologies provide fewer benefits and are less cost effective for “short-distance, lower-speed deliveries on city streets.”²⁷ However, in assessing feasibility and calculating the benefits of these technologies, the agencies carefully accounted for the types of operational differences among trailer types and allocated the benefits in proportion to the amount of low speed and high speed driving and amount of transient operation for each trailer category. For example, as discussed above, the agencies adopted less stringent standards for short box vans because they generally travel shorter distances at lower speeds,²⁸ and the agencies did not require aerodynamic technologies for non-box trailers.²⁹

²⁶ Ben Sharpe & Mike Roeth, Int’l Council on Clean Transp., *Costs and Adoption Rates of Fuel-Saving Technologies for Trailers in the North American On-Road Freight Sector* 8 tbl.2 (2014),

http://www.theicct.org/sites/default/files/publications/ICCT_trailer-tech-costs_20140218.pdf.

²⁷ Truck Trailer Manufacturers Association, Inc.’s Mot. for Stay, at 18, ECF No. 1858510 (Aug. 26, 2020).

²⁸ HD GHG Phase 2 Rule, *supra* note 1, at 73,645.

²⁹ *Id.* at 73,650–51.

MANUFACTURERS HAVE HAD AMPLE LEAD TIME TO MEET THE 2021 TRAILER STANDARDS AND FLEXIBILITIES WILL HELP FURTHER SMOOTH COMPLIANCE.

32. The trailer standards phase in the above-described technologies, with the most stringent standards not taking effect until 2027. Manufacturers may thus gradually make the changes required to secure improvements in fuel economy. The prevalence of these efficiency technologies already in use in the fleet at the time of the 2016 rulemaking is reflected in the baseline NHTSA adopted as a reference point³⁰ for evaluating the benefits and costs of the trailer standards. The baseline was informed in part by a 2014 survey of TTMA members, which found that a majority of box vans were already equipped with LRR tires and that a number of long box vans were equipped with aerodynamic side skirts.³¹

33. The baseline for the trailer standards reflected these levels of technological penetration. The baseline assumed that in MY 2018 and later — without the standards in place—40 percent of full-aero long box vans and 5 percent of full-aero short box vans will have aerodynamic devices, 90 percent of all box vans will have LRR tires, and 45 percent of all box vans will have ATIS technology.³² Other, more recent studies, suggest that for certain fleets, these

³⁰ NHTSA analyzed a static baseline, in which technology penetration would remain constant over time absent the standards, and a dynamic baseline, in which technology penetration would grow but at a rate slower than that provided for by the standards. HD GHG Phase 2 Rule, *supra* note 1, at 73,656–57.

³¹ *Id.* at 73,656; TTMA Letter, *supra* note 18, at 2.

³² HD GHG Phase 2 Rule, *supra* note 1, at 73,656.

technology penetration levels may be even greater. The North American Council for Freight Efficiency's 6th Annual Fleet Fuel Study (AFFS), completed in 2017, includes data from 19 fleets, representing approximately 4 percent of the heavy-duty on-road vehicles in North America. According to the study, in 2016, nearly 90 percent of the trailers surveyed were using aerodynamic technology that would meet the 2018 standards, 80 percent of the trailers had LRR trailer duals, and about 75 percent employed tire pressure inflation systems.³³ The agencies did not expect partial-aero box vans, non-aero box vans, or non-box trailers to adopt aerodynamic devices in the baseline.

34. Manufacturers have had over four years since the rulemaking to achieve compliance with the 2021 trailer standards, which require only incremental improvements beyond these baseline values using technologies that have been available for over a decade. For instance, for long box vans—the most common type of trailers—manufacturers can meet the 2021 standards by incorporating just one or two forms of aerodynamic improvement (i.e., side skirts and/or rear end devices), switching to LRR tires, and adding tire pressure devices.³⁴ In 2027, manufacturers can meet standards by applying additional aerodynamic devices and incorporating more efficient tires. Accordingly, while the trailer standards are necessary to ensure full penetration of fuel consumption reducing technologies in

³³ N. Am. Council for Freight Efficiency, *2017 Annual Fleet Fuel Study* (2017).

³⁴ See HD GHG Phase 2 Rule, *supra* note 1, at 73,651, 73,659.

the trailer fleet, the 2021 standards can be met by more broadly deploying these readily available technologies.

35. In addition to a modest phase-in, the trailer standards provide further flexibilities to help smooth compliance. First, to address any residual implementation concerns, NHTSA granted each manufacturer an “allowance” of trailers that do not need to meet the standards. For MY 2018 through 2026, up to 20 percent of box van manufacturers’ production (to a maximum of 350 units) are not required to comply with the trailer standards.³⁵ The agency adopted a similar allowance for non-box trailer manufacturers.

36. Second, the standards allow manufacturers to receive credit for off-cycle technologies—for example, trailer solar roof panels—that are not necessary to meet the current standards. This allows manufacturers to develop additional efficiency technologies that were not accounted for at the time of the Phase 2 rulemaking and get credit for those technologies toward meeting the standards.

TRAILER STANDARDS RELY ON TECHNOLOGIES THAT HAVE LONG BEEN DEPLOYED IN VOLUNTARY AND REGULATORY PROGRAMS.

37. The technologies that form the basis of the trailer standards have long been deployed in various voluntary and regulatory programs. For example, EPA’s voluntary SmartWay program helps freight companies track and assess fuel efficiency, and works with the industry to identify and advance fuel-efficient

³⁵ *Id.* at 73,674–75.

technologies and practices. SmartWay verifies the performance of technologies—including the aerodynamic equipment and LRR tires identified by EPA as approved means of complying with the trailer standards—and publishes that performance information on its website.

38. Trailers equipped with specific SmartWay-verified technologies may receive special status under the program, as either a SmartWay Designated trailer or a SmartWay Designated Elite trailer. A SmartWay Designated trailer is a 53-foot box van with verified LRR tires and one or more verified aerodynamic devices. A SmartWay Designated Elite trailer is a 53-foot box van with verified LRR tires and two or more verified aerodynamic devices.³⁶

39. The SmartWay website advertises that fleets can purchase SmartWay Designated trailers from manufacturers such as Utility Trailer Manufacturing Company (Utility Trailer), Hyundai Translead, Inc. (Hyundai Translead), Great Dane LLC, and Wabash.³⁷ These manufacturers are all TTMA members and three of them are declarants in support of TTMA in this litigation. These trailer manufacturers do not only have a demonstrated capacity to produce trailers with LRR tires and aerodynamic devices that would meet the 2021 and 2027 trailer standards, but are doing so now as a matter of business as usual.

³⁶ EPA, *SmartWay Designated Tractors and Trailers*, <https://www.epa.gov/verified-diesel-tech/smartway-designated-tractors-and-trailers> (last visited September 9, 2020).

³⁷ *Id.*

40. Notwithstanding this widespread adoption, the agencies found that a meaningful percentage of trailers did not yet employ cost-effective technologies to reduce fuel consumption, as discussed more fully below, and so standards were necessary to secure these important benefits.

THERE IS NO EVIDENCE THAT THE TRAILER STANDARDS WILL RESULT IN LOST SALES.

41. I am aware that TTMA has claimed in its motion for stay and in supporting declarations that its members will lose sales due to the trailer standards. This claim is based on TTMA's assertion that, because the trailer technologies required by the rule save trailer purchasers money, these purchasers have an incentive to incorporate technologies where they are profitable. Where market forces do not lead to incorporation of these technologies, TTMA hypothesizes, they will deliver no fuel savings benefits to purchasers. These claims rest on unsupported assumptions that are inconsistent with available data on trailer sales, orders, and cancellations.

42. Available Data Contradict Claims that Trailer Sales Have Been Adversely Affected by the Trailer Standards. Available sources indicate that although trailer industry sales declined in early 2020, these declines have been driven by the COVID-19 pandemic and are not related to the upcoming implementation of NHTSA's standards. Moreover, sales have been steadily improving since reaching a low point in April and are projected to continue

improving throughout 2021. This further indicates that NHTSA's 2021 standards are not expected to reduce trailer sales.

43. In its latest industry report, market research firm ACT Research described recent sales declines as “COVID-generated.”³⁸ Similarly, in its quarterly 10-Q report filed July 29, 2020, TTMA member and major trailer manufacturer Wabash described the trailer industry outlook as being driven by COVID, with no mention of the upcoming NHTSA standards.³⁹ Wabash noted that ACT Research and its peer market research firm FTR Associates projected decreased trailer production in 2020 “[a]s a result of overall industry and economic uncertainty worsened by the ongoing COVID-19 pandemic.”⁴⁰ In describing projected production for future years, Wabash attributed ongoing uncertainty to “the unknown duration and severity of the ongoing COVID-19 pandemic.”⁴¹ And various trade press articles further underscore the industry understanding that decreased sales are attributable to COVID-19.⁴²

³⁸ ACT Research, *State of the Industry: U.S. Trailers* at 1 (Aug. 19, 2020).

³⁹ Wabash Nat'l Corp., Quarterly Report (Form 10-Q) at 37, 39 (July 29, 2020), <https://ir.wabashnational.com/static-files/9b096fd0-0dbb-4c5e-9399-56ecaed555d0>. Wabash also noted that 2019 sales set an all-time industry record, and even before COVID, 2020 sales were projected to be somewhat lower, consistent with historic levels. *Id.* at 37.

⁴⁰ *Id.* at 37.

⁴¹ *Id.*

⁴² See Automotive World, *ACT Research: U.S. trailer net orders post another significant improvement in July* (Aug. 20, 2020), <https://www.automotiveworld.com/news-releases/act-research-u-s-trailer-net->

44. Available sources indicate that while significant, the COVID-induced decrease in trailer sales appears to be temporary and the industry is on its way to recovery. ACT Research said in its latest report that “[t]he industry continues to climb from the COVID-generated historic low order volume posted in April.”⁴³ Wabash noted that both ACT and FTR Associates projected in April that 2020 sales would be around 50% lower than 2019 levels due to COVID, but both revised their projections upward by around 20% in July.⁴⁴ And the trade press has also noted that the industry has “continue[d] to climb” in June and July, even as the NHTSA standards’ effective date approaches.⁴⁵

45. Available sources also project continued sales growth throughout 2021. ACT Research and FTR Associates have projected production levels to

[orders-post-another-significant-improvement-in-july/](#) (quoting Frank Maly of ACT Research, who described a “COVID-generated historic low order volume posted in April”); Roger Gilroy, *July Trailer Orders Keep Rising from COVID Bottom*, Transport Topics (Aug. 18, 2020), <https://www.ttnews.com/articles/trailer-orders-keep-climbing-july-hit-19300>.

⁴³ ACT Research, *supra* note 38, at 1; *see also id.* at 9 (“After a string of 18 months of negative y/y comps, net orders have now posted solid y/y gains in both June and July. The strength is the result of larger fleets re-entering the market.”); *id.* at 11 (noting that July 2020, the dry van industry had the best gross and net order volume since November 2019 and the lowest cancel volume of the year).

⁴⁴ Wabash 10-Q, *supra* note 39, at 37.

⁴⁵ Automotive World, *supra* note 42 (quoting Frank Maly, ACT Research Director-CV Transportation Analysis and Research); *see also* Gilroy, *supra* note 42 (discussing increased orders for July reported by both ACT and FTR Associates).

increase to 210,000 in 2021 as the industry continues to recover.⁴⁶ Executives from TTMA declarants Great Dane and Utility Trailer have also expressed that they “believe that the industry will continue to improve in upcoming months” and “cannot be held down for long.”⁴⁷ Moreover, Wabash’s latest annual 10-K report, filed in February of 2020, suggests that the NHTSA standards may benefit, rather than hinder, this recovery. Wabash noted that “[i]n addition to increasing the cost of a trailer, these regulations may also lead to a higher demand for various aerodynamic device products.”⁴⁸ Wabash further stated that it “believe[d] the need for trailer equipment will be positively impacted” by the coming regulatory requirements it discussed, which included the NHTSA trailer standards.⁴⁹ This indicates that there is no expectation of a disruption to the market as a result of the 2021 trailer standards. Taken together, this data paints a picture of improving trailer industry sales and does not support the sales disruptions from NHTSA’s standards that TTMA alleges in its filings and declarations.

⁴⁶ Wabash 10-Q, *supra* note 39, at 37 (discussing ACT and FTR’s projections); Gilroy, *supra* note 42 (same).

⁴⁷ Gilroy, *supra* note 42 (first quoting Chris Hammond, Great Dane Executive Vice President of Sales, then quoting Craig Bennet, Utility Trailer Senior Vice President of Sales).

⁴⁸ Wabash Nat’l Corp., Annual Report (Form 10-K) at 28 (Feb. 25, 2010), <https://ir.wabashnational.com/static-files/442b2d6d-5a7e-44bb-85b9-6a6b4697696c>.

⁴⁹ *Id.* at 29.

46. *Economics Literature and the History of Vehicle Standards*

Undermine Claims that the Trailer Standards Will Result in Lost Sales. Finally, TTMA's claims that trailer manufacturers will lose sales due to the standards are based on two flawed assumptions: 1) that the market will function perfectly on its own to deliver fuel savings; and 2) that consumers will not purchase trailers that meet more efficient standards.

47. There is a well-developed and rigorous body of research documenting that market barriers prevent some purchasers from investing in efficiency technology that will save them fuel and money.⁵⁰ One reason is that purchasers may not have complete or reliable information about the effectiveness and durability of a particular technology—both in the new vehicle market and the resale market. Another, which is particularly true in the heavy-duty market, is that there are barriers due to split incentives, where the party paying the upfront cost of the fuel-saving equipment may be different from the party realizing the fuel cost

⁵⁰ HD GHG Phase 2 Rule, *supra* note 1, at 73,859; *see also* Heather Klemick et al., *Heavy-Duty Trucking and the Energy Efficiency Paradox: Evidence from Focus Groups and Interviews*, 77 *Transp. Res. Part A: Pol'y & Practice* 154 (2015), Docket ID: EPA-HQ-OAR-2014-0827-1992; N. Am. Council for Freight Efficiency & Cascade Sierra Sols., Mike Roeth et al., *Barriers to the Increased Adoption of Fuel Efficiency Technologies in the North American On-Road Freight Sector* (2013), Docket ID: EPA-HQ-OAR-2014-0827-0084; CE Delft, Sanne Aarnink et al., *Market Barriers to Increased Efficiency in the European On-Road Freight Sector* (2012), Docket ID: EPA-HQ-OAR-2014-0827-0076.

savings.⁵¹ A third is that even with relatively short payback periods, like the period of up to two years here, some companies will still choose to invest their money in ways other than fuel-saving devices. Even in a relatively efficient market, these barriers can impede the development and uptake of the full array of modern technologies.

48. Regardless of the efficiency of the trailer market, it is incorrect to assume that the fuel savings delivered by the market—i.e. what is profitable for purchasers—are the same as reductions that can be delivered by NHTSA’s standards. For example, purchasers may seek payback times as short as 6 months to incorporate fuel-saving technologies into their fleet.⁵² Standards can ensure that technologies with incrementally longer payback periods—for instance, up to two years in the case of the 2027 trailer standards—can nonetheless be deployed in a way that saves fuel, saves money. As described above, NHTSA crafted common sense trailer standards to ensure they would apply only to trailers where technologies would help to realize fuel savings and at the same time minimize the regulatory burden on the trailer manufacturers. NHTSA found, however, that the market alone wouldn’t ensure full deployment of these technologies:

We do not believe a voluntary trailer program will produce sufficient emissions and fuel consumption reductions to meet our regulatory

⁵¹ HD GHG Phase 2 Rule, *supra* note 1, at 73,860; *see also* Roeth et al., *supra* note 50.

⁵² Sharpe & Roeth, *supra* note 26, at 8 tbl.2.

obligations. The agencies' baseline accounts for improvements already present in the trailer fleet due to participation in the voluntary SmartWay program or other factors. The agencies project that very significant and cost-effective reductions over that baseline are available, largely through further utilization of already-available tire and aerodynamic technologies that are not presently deployed on significant portions of the trailer fleet. Thus, reliance on further voluntary efforts will not achieve reductions which are readily feasible in the lead time provided, cost-effective, and which indeed, will pay for themselves in fuel savings.⁵³

49. Previous standards have functioned in the same manner. For instance, standards for cars and light trucks have required deeper penetration of fuel saving technologies than would otherwise be delivered by the market. Automakers have met these standards, while experiencing record sales over the last several years (prior to COVID-19). While there are some differences between the trailer markets and car and truck markets, this past experience undermines the claim that fuel efficiency standards result in loss of sales.

50. Moreover, it is unlikely that TTMA's members will lose market share, as TTMA claims. First, this claim depends on the assertion that purchasers will not buy more efficient trailers described by the standards, which, as described above, is inconsistent with market data, economic research, and experience with car and light truck standards. Second, as TTMA notes, its members produce over 90

⁵³ EPA & NHTSA, EPA-420-R-16-901, Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles – Phase 2: Response to Comments for Joint Rulemaking 965–66 (2016), Docket ID: EPA-HQ-OAR-2014-0827-2344.

percent of trailers on the market (a virtual monopoly), so it is unclear how market shifts could collectively impact TTMA's membership.⁵⁴ Finally, competitors must apply the same technologies as TTMA's members, so complying with the 2021 standards will not put those members at any competitive disadvantage.⁵⁵

IT IS UNLIKELY THAT THE TRAILER STANDARDS WILL RESULT IN ADDITIONAL EXPENSES RELATED TO PERSONNEL OR STORAGE.

51. TTMA members also claim that they will incur additional expenses associated with storing trailer parts, including hiring personnel and building storage facilities.

52. These claims depend on the assertion that trailer manufacturers will not be able to sell more efficient trailers, which as described above, is inconsistent with market data and company statements. Indeed, it is likely that manufacturers will pass along to purchasers any additional costs associated with producing more efficient trailers. Purchasers, in turn, will recoup any such additional costs through

⁵⁴ Decl. of Jeff Sims in Supp. of Truck Trailer Manufacturers Association, Inc.'s Mot. for Stay ¶ 2, ECF No. 1858510 (Aug. 26, 2020).

⁵⁵ Small business manufacturers had an additional year to comply with EPA's 2018 standards, but this delay does not apply to the 2021 NHTSA standards. HD GHG Phase 2 Rule, supra note 1, at 73,526 ("Even with [the one-year delay for EPA's standards], small businesses will be required to comply with EPA's standards before NHTSA's fuel efficiency standards are mandatory. Because of this timing, compliance with NHTSA's regulations will not be delayed, as small businesses will be accommodated through EPA's initial one-year delay.").

fuel savings within six months to two years.⁵⁶ Given these practices, it is likely that companies would recoup any additional costs associated with manufacturing more efficient trailers when those trailers are sold.

53. In addition, NHTSA's analysis in the record suggests that the specific storage costs presented in TTMA's declarations are overstated. The agency concluded that large manufacturers could experience one-time costs of approximately \$250,000 for storage and small manufacturers could experience costs of approximately \$125,000.⁵⁷ The agencies also estimated startup costs to be \$65,600 for any manufacturers that produce box vans and \$46,500 for manufacturers that only produce non-box trailers.⁵⁸

54. Finally, given the seasonality of the trailer business, manufacturers likely employ just-in-time manufacturing processes to further minimize the need for extended storage.

THE HARMS TTMA MEMBERS ALLEGE REPRESENT A VERY SMALL FRACTION OF COMPANY REVENUES.

55. As discussed above, the economic impacts asserted in TTMA members' declarations are either inconsistent with available data, unsubstantiated,

⁵⁶ See HD GHG Phase 2 Rule, *supra* note 1, at 73,481; Sharpe & Roeth, *supra* note 26, at 8 tbl.2.

⁵⁷ Memorandum from Jessica Brakora, Eng'r, Assessment & Standards Div., Office of Transp. & Air Quality, EPA, to HD GHG Phase 2 Docket, on Small Business Economic Burden Calculations for Trailer SISNOSE Analysis 2 (July 18, 2016), Docket ID: EPA-HQ-OAR-2014-0827-2218.

⁵⁸ *Id.*

or highly speculative. Even assuming these TTMA members' claims are accurate, however, the alleged expenses represent only a very small fraction of company revenues. The only company that has quantified its claimed costs under the 2021 standards is Utility Trailer. Utility claims that it will spend \$3,600,000 to construct additional storage facilities, \$5,000,000 to hire additional personnel, and \$500,000 to purchase trailers dedicated to transporting compliance equipment, for a total cost of \$9,100,000.⁵⁹ This represents less than 1 percent of Utility's \$1.023 billion in revenues reflected in the agencies' Small Business Regulatory Enforcement Fairness Act analysis.⁶⁰

CONCLUSION.

56. The trailer standards are based on readily-available, off-the-shelf technologies that are cost-effective and have a history of use in voluntary and regulatory programs. These technologies will deliver substantial benefits in the form of fuel consumption savings, with no evidence of a disruptive effect on trailer manufacturers' businesses.

I declare that the foregoing is true and correct.

⁵⁹ Decl. of John Harris in Supp. of Truck Trailer Manufacturers Association, Inc.'s Mot. for Stay ¶¶ 23–25, ECF No. 1858510 (Aug. 19, 2020).

⁶⁰ EPA & NHTSA, *Small Business Economic Burden Calculations for Trailer SISNOSE Analysis Spreadsheet* (2016), Docket ID: EPA-HQ-OAR-2014-0827-2218.

A handwritten signature in black ink, appearing to read "Michael P. Walsh", written over a horizontal line.

Michael P. Walsh

Dated September 11, 2020